Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 91-8685

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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January 6, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3288

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 18, 1992
CERTIORARI GRANTED NOVEMBER 9, 1992

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 90-6-Cr-J-14

UNITED STATES OF AMERICA, PLAINTIFF

v.

TERRY LYNN STINSON

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1-10-90	1	**INDICTMENT RETURNED AT JACKSONVILLE, FLORIDA**
		* * * *
01-29-90	5	**RECORD OF HEARING: INITIAL APPEARANCE/ARRAIGNMENT. HES** Deft is serving 25-yr State sentence and not entitled to Bond. Deft advised of charges, penalties, special assessment & rights. Deft requested court-appointed counsel and Federal Public Defender appointed. Not guilty plea entered. Deft remanded to custody.
04-11-90	32	**RECORD OF HEARING: CHANGE OF PLEA SHB** Deft placed under oath

DATE	NR	PROCEEDINGS
		and withdrew previously entered plea of not guilty and pled guilty to counts 1,2,3,4,5. Court accepted plea of guilty and ordered a PSI. Psychological Evaluation filed in camera.
04-11-90	34	**NOTICE** of Sentencing on 6-27-90, 11:00 a.m. before the Hon. Susan H. Black (Parties notified)
07-06-90	39	**RECORD OF HEARING: SENTENCING SHB** Deft is adjudged guilty on counts 1 thru 5. Court finds no grounds for guidelines departure. **SENTENCE: Imprisonment as to each of counts 1, 2, 4 & 5 – 365 months. as to count 3 – 5 years to run consecutive to the sentence imposed in counts 1, 2, 4 & 5.** Supervised release of 5 years. special assessment in the amount of $250.00 to be paid immediately. Deft exhibits 1-18 filed in evidence. Deft's exhibits list filed in open Court. Deft is remanded to custody of USM. govt Witnesses: CWO2 Dan Haines; Thomas Sobolewski. Court ordered statement of reasons attached to judgment. Deft advised of right to appeal and to counsel on appeal. Notice concerning appeals from criminal conviction furnished to counsel for deft.
07-06-90	41	**JUDGMENT** Including Sentence Under the Sentencing Reform Act. /s/SHB MR117/1765 (Parties notified)
07-13-90	42	**NOTICE OF APPEAL**, by Deft

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3711

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

TERRY LYNN STINSON,
DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Middle District of Florida at Jacksonville
Susan H. Black, District Judge

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/06/90	Appearance filed for appellant
12/28/90	Brief for appellant filed
10/4/91	Initial opinion rendered
10/25/91	Petition for rehearing filed
3/20/92	Opinion denying rehearing
4/23/92	Order denying rehearing en banc

APPENDIX B

[Filed Jan 10 1990]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 90-6-CR-J-14

UNITED STATES OF AMERICA

v.

TERRY LYNN STINSON

Ct. 1: 18 U.S.C. §2113(d)
(25 yrs/$250,000/both)

Ct. 2: 18 U.S.C. §§922(g), 924(a)(2) and 924(e)
(15 yrs to life/$250,000/both)

Ct. 3: 18 U.S.C. §924(c)
5 yrs min. man. consecutive/
$250,000/both)

Ct. 4: 26 U.S.C. §§5861(d) and 5871
(10 yrs/$250,000/both)

Ct. 5: 18 U.S.C. §2313
(5 yrs/$250,000/both)

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, by force and violence and by intimidation, did knowingly and willfully take from the person and presence of Carole Benson, a Customer Service Representative, Elizabeth Neven, a teller, and Alice McGraw, a teller, about $9,427.00 in money belonging to and in the care, custody, management, and possession of the Sun Bank of Jacksonville, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and TERRY LYNN STINSON, in committing the aforesaid offense, did assault Carole Benson, Elizabeth Neven, and Alice McGraw and did put in jeopardy the lives of said Carole Benson, Elizabeth Neven, and Alice McGraw by means and use of a dangerous weapon, that is, a short-barreled shotgun.

In violation of Title 18, United States Code, Sections 2113(a) and (d).

COUNT TWO

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, having been previously convicted of crimes punishable by imprisonment for a term exceeding one year, that is:

1. Armed Robbery, convicted in the Circuit Court of Pike County, Mississippi, Case No. 12,255, on or about October 27, 1978;

2. Burglary, convicted in the Circuit Court of Macon County, Illinois, Case No. 77-CF-536, on or about December 3, 1979;

3. Armed Robbery, convicted in the Circuit Court of Macon County, Illinois, Case No. 78-CF-345, on or about March 19, 1980;

4. Simple Assault on a Law Enforcement Officer, convicted in the Circuit Court of Humphreys County, Mississippi, Case No. 2976, on or about February 19, 1982;

5. Attempted Escape by Force or Violence, convicted in the Circuit Court of Humphreys County, Mississippi, Case No. 2976, on or about February 19, 1982; knowingly did possess in and affecting commerce a firearm, that is a New England Arms Company, Inc., 12-gauge single-barreled shotgun with serial number NA127586.

In violation of Title 18, United States Code, Sections 922(g), 924(a)(2) and 924(e).

COUNT THREE

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, knowingly did use and carry a firearm, that is, a short-barreled shotgun described as a New England Arms Company, Inc., 12-gauge single-barreled shotgun with serial number NA127586 and a barrel length of approximately 11 15/16 inches, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, bank robbery as described in Count One.

In violation of Title 18, United States Code, Section 924(c).

COUNT FOUR

On or about October 31, 1989, at Jacksonville, in the Middle District of Florida,

TERRY LYNN STINSON

the defendant herein, did knowingly possess a firearm, that is, a short-barreled shotgun more particularly described as a New England Arms Company, Inc., 12-gauge single-barreled shotgun with serial number NA127586 and a barrel length of approximately 11 15/16 inches, not registered to him in the National Firearms Registration and Transfer Record.

In violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT FIVE

On or about October 31, 1989, to on or about November 3, 1989, at Jacksonville, in the Middle District of Florida, and elsewhere,

TERRY LYNN STINSON

the defendant herein, did knowingly and willfully transport in interstate commerce a stolen motor vehicle, that is, a 1985 Ford conversion van vehicle identification number 1 FDDE14FHA53748, from Jacksonville, in the State of Florida, to Gulfport in the State of Mississippi, knowing that said motor vehicle was a stolen motor vehicle.

In violation of Title 18, United States Code, Section 2312.

A TRUE BILL

/s/Arthur W. Cross
FOREMAN

ROBERT W. GENZMAN
United States Attorney

/s/ Ronald T. Henry
RONALD T. HENRY
Assistant United States Attorney

/s/ Curtis Fallgatter
CURTIS FALLGATTER, Managing
Assistant United States Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 90-6-Cr-J-14

UNITED STATES OF AMERICA

-vs-

TERRY LYNN STINSON,
Defendant.

Courtroom Number One
10:00 a.m.
April 11, 1990

TRANSCRIPT OF CHANGE OF PLEA PROCEEDINGS
before
THE HONORABLE SUSAN H. BLACK
Chief United States District Judge

APPEARANCES:

For the Government: RONALD T. HENRY, Esquire
Assistant United States Attorney
Post Office Box 600
Jacksonville, Florida 32201

For the Defendant: WILLIAM M. KENT, Esquire
Assistant Federal Public Defender
Post Office Box 4998
Jacksonville, Florida 32201

Also Present: TERRY LYNN STINSON,
Defendant

Court Reporter: EVELYN G. ALDERMAN
Post Office Box 244
Jacksonville, Florida 32201

Proceedings reported by mechanical stenography; transcript prepared by computer.

* * *

[13] THE COURT: At this time I'm going to ask the government to tell me what they would expect to prove if the case were to go to trial. I will ask you if you admit to the truth of the report, and then I'm going to go through the elements of each offense and ask you whether or not you admit to those elements.

MR. HENRY: Your Honor, if this case were to go to trial, the United States is prepared to prove the following facts beyond a reasonable doubt. We have prepared a factual basis and have attached it to the [14] document that we filed with the Court.

On October 31, 1989, at approximately 12:15 p.m., Terry Lynn Stinson, the defendant, entered the Sun Bank of Jacksonville located at 344 Monument Road, Jacksonville, Florida. The defendant approached Carole Benson, a customer service representative who was seated at her desk. The defendant stated, "Give me the money or I'll throw this in your lap. Hang up the phone and give me the money now." The object which the defendant threatened to throw was later determined to be an olive-

green colored inert grenade. Ms. Benson and the defendant walked to the teller window of teller Alice McGraw. Ms. Benson told Ms. McGraw to give the defendant the money before calling out to teller Elizabeth Neven who was working the drive-thru teller window. At that point in time Ms. Benson noticed that the defendant was holding a sawed-off shotgun with a black barrel and a wood stock. The defendant pointed the shotgun at Ms. Benson while standing beside her. The defendant produced a black plastic trash bag from inside his clothing, placing the trash bag on the teller counter. Both Alice McGraw and Elizabeth Neven took money from their teller windows and placed it into the black plastic bag. The defendant ordered Ms. Benson to get behind the gate and Ms. Benson complied.

[15] As the defendant was walking out the door, he ordered the women to hit the floor at which time the defendant threw the inert grenade into the bank on the floor. The defendant then exited the bank.

The Jacksonville Sheriff's Office and the Federal Bureau of Investigation investigated the robbery. An auditor for Sun Bank determined that $9,427.00 was stolen in the robbery. Sun Bank of Jacksonville is a bank whose deposits are insured by the Federal Deposit Insurance Corporation. The bank's Certificate of Insurance is on file with the Federal Deposit Insurance Corporation in Washington, D.C.

The defendant was arrested on November 3rd, 1989, in Gulfport, Mississippi. Prior to leaving Jacksonville, the defendant had at gunpoint taken a 1985 Ford conversion van with Vehicle Identification Number 1FDDE14FHA53748 from the custody of Mr. Willie Gene Dorminey, a salesman for one of the Ford dealerships in Jacksonville. The 1985 Ford conversion van

was recovered in Gulfport, Mississippi. The defendant did not have permission of Mr. Dorminey or any other representative of the Ford dealership to take the conversion van to Gulfport, Mississippi.

After the defendant's arrest on November 3, 1989, agents of the Federal Bureau of Investigation and deputies [16] with the Harrison County Sheriff's Office in Gulfport, Mississippi, conducted a search of the defendant and the conversion van. Over $1,600 was found on the defendant's person. Over $5,000 was recovered from the trunk inside the conversion van.

Bait bills, that is currency whose serial numbers were recorded by Sun Bank prior to the robbery, were discovered in the money found in the conversion van. The sawed-off shotgun was also discovered in the conversion van.

Subsequent investigation determined that the defendant had purchased a New England Arms Company, Inc. 12-gauge, single-barreled shotgun with Serial Number NA127586, from K-Mart on Atlantic Boulevard in Jacksonville, Florida. That shotgun was the sawed-off shotgun recovered from the conversion van. The defendant had converted the shotgun by cutting off the barrel and stock so that the barrel length of the above described shotgun was approximately 11 and 15/16th inches with an overall length of less than 26 inches.

The New England Arms Company, Inc. shotgun which was purchased by the defendant in Jacksonville, Florida, had been manufactured outside the state of Florida and therefore had moved in interstate commerce prior to the defendant's possessing the shotgun in Florida.

[17] A subsequent check of the defendant's criminal record revealed that the defendant was a convicted felon, having been convicted of several felonies, including an armed robbery conviction from the Circuit Court of

Macon County, Illinois, Case No. 78-CF-345, on or about March 19, 1980. Moreover, a search conducted by the custodian of records with the Bureau of Alcohol, Tobacco and Firearms revealed that the above-described short-barrel shotgun which the defendant possessed in Florida was not registered to the defendant in the National Firearms Registration and Transfer Record.

THE COURT: Mr. Stinson, do you admit to the truth of the report? Is the report accurate the government has just given me?

THE DEFENDANT: Yes.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 90-6-Cr-J-14

UNITED STATES OF AMERICA

vs.

TERRY LYNN STINSON,

Defendant.

Jacksonville, Florida
July 6, 1990
Courtroom Number Two

TRANSCRIPT OF SENTENCING
before
THE HONORABLE SUSAN H. BLACK
United States District Court

APPEARANCES:

For the Government: RONALD T. HENRY, Esquire
Assistant United States Attorney
409 Post Office Building
Jacksonville, Florida 32202

For the Defendant: WILLIAM M. KENT, Esquire
Assistant Federal Public Defender
Post Office Box 4998
Jacksonville, Florida 32201

Court Reporter: EVELYN G. ALDERMAN
Post Office Box 244
Jacksonville, Florida 32202

Proceedings recorded by mechanical stenography; transcript produced by computer.

[2] PROCEEDINGS

July 6, 1990 10:00 a.m.

-o0o-

THE CLERK: Case No. 90-6-Cr-J-14, United States of America versus Terry Lynn Stinson.
Counsel for the Government, Ronald T. Henry.
Counsel for the defendant, William M. Kent.
Please come forward.

MR. HENRY: Good morning, Your Honor.

THE COURT: Good morning.

MR. KENT: Good morning, Judge.

THE COURT: This case was previously set for sentencing and at that time counsel for the defendant indicated they had additional objections that were technical in nature, not factual. The Court recessed the sentencing so that those could be placed in the addendum to the Presentence Investigation Report, and so that the Government would have an opportunity to respond and the Court would have an opportunity to review those objections outside the immediacy of sentencing; therefore, the case was continued.

At this time the Court has before it an addendum to the Presentence Investigation Report which sets out objections to the report, by the Government and also by the Defendant.

Mr. Kent, have you had an opportunity to fully read and review the report, and to discuss it with your client?

[3] MR. KENT: Yes, ma'am.

THE COURT: And Mr. Stinson, have you had enough time to read and review the report, and discuss it with Mr. Kent or anyone else you may wish to?

DEFENDANT STINSON: Yes.

THE COURT: In the addendum to the report the Probation Officer certifies that the Presentence Report, including any revisions thereof, has been disclosed to the defendant, his attorney and counsel for the Government, and that the contents of the addendum have been communicated to counsel, and the addendum fairly states that any objections made by counsel have been resolved.

Is that accurate, Mr. Kent?

MR. KENT: Yes, ma'am, it is.

THE COURT: Is that accurate, Mr. Henry?

MR. HENRY: Yes, Your Honor.

THE COURT: The Court, then, will approve the addendum, objection by objection, and address each objection, making the appropriate factual rulings.

The Government's objection on Page 1, Paragraph 3 – excuse me, Page 3, Paragraph 14, and Page 5, Paragraph 23, in reference to the bank robbery offense, the United States' position is that the defendant impeded or obstructed justice by planting or leaving bombs in more than one location.

The Government cites §3E1.1 of the Guidelines, which [4] states,

"If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of

justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter 2 by two levels."

The United States claims to have evidence to demonstrate that the defendant left bombs not only in the pickup truck at Regency Lake apartment complex, but also in the McDonald's Restaurant near the intersection of University and Beach Boulevards.

The Government believes that the bomb placed at McDonald's was an attempt to divert the police's attention from the Regency Square area where the bank robbery and the unlawful confinement took place.

The Government further notes that a bomb threat to University Hospital was phoned in to police just before the Sun Bank was robbed.

It is the Government's position that the base offense level for the bank robbery offense should be increased to reflect an adjustment for obstruction of justice."

The Probation Officer's position was that an adjustment for obstruction of justice would not be warranted in that the obstruction must take place during the investigation or prosecution of the instant offense, and that the defendant [5] made the alleged bomb threats, and the threats occurred during the course of the offense prior to the initiation of any investigation and, therefore, it would not constitute obstruction of justice.

Mr. Kent, I would give counsel an opportunity to further elaborate on that objection, since the Court has read, really, the Probation Officer's version of what, I'm sure is your objection.

MR. KENT: Yes, Judge, I accept the Probation Officer's position and have nothing further to add.

THE COURT: Mr. Henry.

MR. HENRY: Your Honor, while we realize that this would not have an impact on the sentencing guide-

lines since Mr. Stinson is a career offender, we believe that were he to be sentenced under the ordinary sentencing guidelines that the obstruction of justice would apply because the police were diverted from the investigation of the robbery at Sun Bank by the fact that there were two bombs placed, and a bomb threat to the University Hospital and, therefore, that impacted the police ability and the F.B.I.'s ability to investigation the full impact of the bank robbery.

THE COURT: Did any of these events happen after the bank robbery?

MR. HENRY: The first bomb that we'll demonstrate, was set at about 9:30 in the morning, approximately three [6] hours before the bank was robbed.

The second bomb was found in the pickup truck which was used in the bank robbery shortly after, I would say it would have to be probably within an hour after the bank robbery itself. The bomb threat itself came in just prior to the bank robbery.

THE COURT: Do you have anything further, Mr. –

MR. HENRY: We recognize that it may be a moot point because it will not impact the scoring, but we wanted the record to be clear as to his entire conduct.

THE COURT: Do you have anything further you would like to present concerning the Government's position?

MR. HENRY: Not as far as this legal argument is concerned. I do have evidence to demonstrate our belief that Mr. Stinson is the source of the bomb that was in the McDonald's Restaurant.

THE COURT: If you would proceed.

And just to make sure that I'm correct, when you're referring to the first bomb, you're referring to the McDonald's Restaurant?

MR. HENRY: Yes, Your Honor.

THE COURT: And when you're referring to the second bomb, you're referring to the Regency Lake Apartments?

MR. HENRY: Yes, Your Honor.

[7] Your Honor, may it please the Court, the United States would call Chief Warrant Officer Dan Hains.

MR. KENT: Judge, we would be willing to stipulate, if it's appropriate, that Mr. Stinson was the source of this bomb, or however it's described.

THE COURT: Is that correct, Mr. Stinson?

DEFENDANT STINSON: Yes.

THE COURT: In light of that stipulation, the Government may call the witness but just for very brief testimony, so the Court will have a full appreciation of the facts.

MR. HENRY: Thank you, Your Honor.

Chief Hains.

THE COURT: Sir, if you would come forward. The Clerk is going to administer the oath, and because your testimony will be very brief you may just stand next to the Government.

THE CLERK: Raise your right hand.

(The witness is sworn by the Clerk.)

THE CLERK: Thank you. Please state your name.

THE WITNESS: Dan S. Hains.

THE CLERK: Spell your last name, please.

THE WITNESS: H-a-i-n-s.

DAN S. HAINS,

called as a witness by the Government, being first produced [8] and duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HENRY:

Q. You're a Chief Warrant Officer in the United States Navy?

A. Correct.

Q. And what is your particular job assignment, function, with the Navy?

A. Right now I'm the Officer in Charge of the Explosive Ordnance Disposal Detachment, Mayport.

Q. Were you personally assigned to investigate or to disarm a bomb at the McDonald's Restaurant at University and Beach Boulevards, Jacksonville, Florida?

A. We received a call from the police department requesting our assistance. We got permission from the Commanding Officer of the base to respond to a civil incident and showed up at McDonald's to take care of a suspected item located in the bathroom at McDonald's.

Q. And you personally observed the suspected destructive device yourself, is that correct?

A. Yes, I did.

Q. Have you also observed items which were seized from Mr. Stinson after his arrest?

A. Yes, I did.

Q. And based upon that, do you have an opinion as to the [9] source of that bomb in the McDonald's Restaurant being the same person that had the items that were seized from Mr. Stinson; is that correct?

A. Yes. Numerous items that were shown to me by the F.B.I. were also used in the bomb we disarmed at McDonald's.

Q. And did you also see a destructive device, or, I guess, just for layman's purposes I'll call it a bomb, that was in this white Chevy pickup truck at Regency Lakes?

A. Yes, I did.

Q. And you had the opportunity to observe it and to inspect it closely?

A. Yes.

Q. And did you come to that same conclusion as to the person who made that bomb being the same person who owned the items that were ultimately seized from Mr. Stinson?

A. Yes. There were components in there that were the same as the ones that were shown to me again by the F.B.I., and the same as what was used at McDonald's.

Q. Can you tell the Judge in your expert opinion as a person dealing in explosive ordnance devices – how long have you been doing this? First let me ask you that.

A. I first started doing it back in January of 1977 upon graduation from Explosive Ordnance Disposal School in Indian Head, Maryland.

Q. And has that been your primary assignment since that [10] time?

A. Yes. There have been no breaks.

Q. Could you tell the Judge what type of thought and care it would take to construct the two devices that you saw.

A. Well, just from the appearance, everything was there that was necessary to create an operational explosive device. We had a power source, we had – which is a 9 volt battery. We had a container to hold the explosive device, which was rifle powder. We had wires running inside hooked up to what appears to be, or what is in fact model rocket igniters. We had a switch on the top that was constructed out of wooden clothespins.

Based on the observation of what we seen and what we've dealt with and trained on in the past, we took it to be a live explosive device and proceeded to run what we call a J-rod attack, a water cannon attack on it, that has a

ninety-eight percent chance of defeating the item without it going off. In this case we defeated the item.

Q. Is this something that – would you characterize it as unsophisticated, sophisticated or moderately sophisticated, if you can characterize it at all, in terms of the construction and the design?

A. It was a basic explosive device. He had a circuit with explosives and a way to initiate it, from what we could see.

With an IED, or an improvised explosive device it's [11] hard to say, you can't see inside the package to see if he had a secondary initiation device in there. The outside was a very basic design.

Q. Does it take any thought or care in constructing?

A. Yeah, I would – yes, I would say it does take quite a lot of care, a lot of thought in constructing.

Q. Both of them, or just one of them?

A. I'd say both of them.

Q. Thank you.

MR. HENRY: No further questions.

THE COURT: Mr. Kent.

CROSS EXAMINATION

BY MR. KENT:

Q. Just one question, Officer.

Was anyone injured in defusing this device?

A. Nobody was injured. The defusing did a little bit of damage to McDonald's, but not very much.

MR. KENT: Thank you, sir.

THE COURT: Thank you.

MR. HENRY: Your Honor, as far as the actual devices themselves, Chief Warrant Officer Hains is my only witness.

I do have one other witness to elaborate on what will be our ultimate argument, and which has been our argument all along, that Mr. Stinson should be sentenced to [12] life imprisonment.

THE COURT: Does that relate to this first objection?

MR. HENRY: No.

THE COURT: Then if we could defer that until later so that we will have an orderly process.

MR. HENRY: Yes.

THE COURT: The objective, the Court has found in order to proceed in the most reasoned way, is to go through the objections, obtain a total offense level based on the Court's rulings, and then within that offense level, or any argument for departure, the Court will address that in aggravation and mitigation.

Is there anything further, Mr. Kent?

MR. KENT: No, ma'am.

THE COURT: The Court would find from the testimony of Chief Hains, from the evidence it has heard, and from the defendant's admission, that a bomb was discovered in McDonald's Restaurant three hours before the robbery; a second bomb an hour after the robbery at the Regency Lakes apartment complex, and there was a threat before the robbery. The defendant was responsible for this conduct.

It is the Probation Officer's position and the defendand't position that the obstruction was not during the [13] investigation or prosecution of the instant offense.

The Court would find that if all of the conduct had occurred prior to the robbery the decision would be more difficult. In this case, though, at least one of the bombs, the second bomb at the Regency Lake Apartments, was an hour after the robbery; and the Court would find that

it did impede the investigation of the instant offense; therefore, the Court would sustain the Government's objection.

Those findings, first of all, would be reflected in the Presentence Investigation Report, which would be Paragraph 14; and then on Paragraph 23, the Court would increase by two levels the adjustment for obstruction of justice, which would make the total 39.

The defendant has several objections. The first objection is to the Probation Officer denying the defendant an adjustment for acceptance of responsibility.

Defense counsel indicated that the defendant admitted his involvement in the offense and should be granted a two level reduction in offense level pursuant to 3E1.1 of the guidelines. The Probation Officer is of the opinion that the defendant does not clearly demonstrate a recognition and affirmative acceptance of personal responsibility.

Pursuant to 3E1.1 of the guidelines, there are a number of factors to consider in determining whether the defendant qualifies for this provision. One of these considerations [14] is voluntary termination or withdrawal from criminal conduct or association.

After the defendant committed the bank robbery, the defendant fled the Jacksonville area and traveled to Orlando, Florida, in a stolen van. The following day Mr. Stinson continued his pattern of criminal behavior by traveling in interstate commerce to the state of Mississippi in the stolen vehicle. The defendant's continuation of committing illegal acts subsequent to the bank robbery does not demonstrate voluntary termination from the criminal conduct.

Another consideration in determining whether a defendant qualifies for this provision is voluntary sur-

render to authorities promptly after the commission of the offense. As the Presentence Report reflects, Mr. Stinson did not surrender to law enforcement authorities, but instead was apprehended approximately five days after the bank robbery in Gulfport, Mississippi. Upon arrest, the defendant was attempting to obtain a taxi to flee the motel where he was staying.

Finally, the timeliness of the defendant's conduct in manifesting acceptance of responsibility must be considered. The defendant did not acknowledge his guilt in this case until the eve of trial. It is felt by the Probation Office that the defendant entered a guilty plea only for expediency [15] and it was not a significant display of remorse.

Mr. Kent, if you wish to make any argument concerning that point.

MR. KENT: Judge, has the Court had the benefit of my letter to the Probation Office in which I detailed the objections. I don't want to repeat if the Court has already read that letter.

THE COURT: No. If you would repeat.

MR. KENT: The highlights, Judge, of our position are that, first, we would point out that the Probation Office in the original Presentence Report made a determination that Mr. Stinson had affirmatively accepted responsibility for the offense and accorded Mr. Stinson acceptance of responsibility status and recommended the two level downward adjustment.

Then the Goverment objected to the accord of acceptance of responsibility and in the first addendum to the Presentence Report, the Probation Office changed its position.

Now, in the Government's objection I would, it's my position that the Goverment did not bring forth any new

facts or any new legal theory, but simply repeated the known facts.

The Probation Office in the original Presentence Report had taken the, I believe, mistaken position that acceptance [16] of responsibility did not affect the total offense level after the adjustment was made for the career offender status. That is, the way they worked the original Presentence Report was they gave him acceptance of responsibility, took two levels off of the underlying offense base offense level, then made the career offender adjustment, bringing him to level 37; then they made no further adjustment for acceptance of responsibility. Now, this error was called to the Probation Officer's attention, so in the addendum this was corrected.

It was pointed out that if the Probation Office had not changed its position and it continued to give acceptance of responsibility credit, the adjustment would be made after the career offender adjustment is made. In other words, the way the Probation Office had originally done it, it was a moot point because it didn't affect the bottom line. But they recognized later that it would affect the bottom line and then changed their position on whether he should receive acceptance of responsibility.

Now, the original addendum to the Presentence Report noted just two factors for that change. Those were that Mr. Stinson did not enter a guilty plea until the eve of the scheduled trial, and second, that Mr. Stinson had never given a statement to law enforcement officers, but had given a statement to the Probation Officer admitting his [17] responsibility.

As to the second point, I pointed out to Probation, in response to the addendum, that to the best of our knowledge Mr. Stinson had never been asked for a statement and that there is no law enforcement authority who really wanted any statement from Mr. Stinson.

And we pointed out also in the meeting of the parties, in response to the addendum, that the F.B.I. 302, which I later intend to admit as an exhibit, on the arrest of Mr. Stinson out in Gulfport, Mississippi, indicated that when Mr. Stinson was taken into custody he was advised of his rights, and he said that he wanted to speak to a lawyer. Now, this was after Mr. Stinson had voluntarily signed consent to search forms for the van and for the motel room. The van was searched and the balance of the robbery proceeds were found in the van.

After these consents to search were signed, Mr. Stinson was advised of his rights in addition to the consent to search rights, and said he wanted to speak to a lawyer, so the F.B.I., as is their practice and as is correct, did not question Mr. Stinson any further. Since then, to the best of our knowledge, no law enforcement authority has ever asked to speak to Mr. Stinson.

Now – and since then, though, Judge, Mr. Stinson has volunteered to give information to the Government not only, [18] of course, about this offense, again which the Government doesn't need any additional information, but about other crimes that Mr. Stinson is aware of from his past incarceration.

Now, it's true that the plea, as to the other point Probation raised, was not until the eve of trial. But it is also true that Mr. Stinson had never denied committing the offenses, and that, as the Court will remember, we filed proposed voir dire questions and proposed jury instructions for the defendant. The position taken both in the voir dire and the jury instructions was quite straightforward, that Mr. Stinson admitted he had done these offenses, but he was going to raise as a possible defense a legal theory of justification, that he had done these offenses for a reason, and it's the same reason which

we're going to consistently present here this morning in mitigation. But the legal theory was justification as a defense, not a denial of commission of the offenses. That again was in the voir dire questions where we admitted to the jury that Mr. Stinson admits that he had committed these offenses, and also in the proposed jury instruction where we sought an instruction on justification as a legal defense.

Also, Mr. Stinson just pointed out to me that he agreed to waive extradition out in Gulfport, Mississippi. He did everything he could to cooperate with the authorities at the [19] time of his arrest.

Now, the Government raised some specific objections, though, and they went point by point through the commentary on acceptance of responsibility, and I have just a very brief response to each of those.

Voluntary termination of criminal conduct. The Government points out or takes the position that there was no voluntary termination of criminal conduct. I would ask the Court to look at a broader scope, starting with the time Mr. Stinson escaped from the Leflore County jail in Mississippi where he was a trusty and his escape consisted of walking away. In fact, his escape wasn't detected until almost a day later, or several hours later because of his trusty status. Mr. Stinson walked away from the jail, he didn't steal a vehicle to flee, he walked away and hitchhiked away from the Leflore County jail.

He went to Tallahassee, Florida, this was in January of 1988, where he got a job with a labor pool. He worked well in the labor pool, was hired by a construction company full time. That construction company went bankrupt, he was hired by another construction company that had worked with that one. He worked consistently,

Judge, pretty much six days a week the entire time that he was on this escape status.

His employers were interviewed at both construction companies and they both reported that he was a good [20] employee, that he stayed out of trouble, that the construction crews were a pretty rowdy bunch and often got into scrapes but Mr. Stinson stayed away from that kind of stuff.

He did not conceal any new offenses while he was on this escape status for almost a year. He was stopped for a traffic violation where he had no valid driver's license. He gave his correct name. About a week later then he was, after that traffic stop and this is after almost a year out on escape status where he was working six days a week supporting himself and not getting into any trouble, he was laid off from his job.

When he was laid off he went home and found out from his roommate that the police had been by with a warrant for his arrest. He had given his true name at the time of the traffic stop and he jumped to the conclusion that this was a warrant for arrest for his escape, when in fact it was a warrant for arrest for not responding to the no valid driver's license. He panicked and went on this crime spree that he admits to.

Judge, other than this, if we look at it in the broader scope, there was a voluntary termination of criminal conduct for a period of a year, almost a year, from January to October of 1989.

This bank robbery that was committed, once it was done, [21] which we'll explain his reasons for doing it to the Court later, there wasn't any further criminal conduct; I mean, it was a bank robbery and it was over, there wasn't any continued criminal activity. Now, the Probation Office in the second addendum notes that, well,

continuing to drive the stolen vehicle was a continued crime, but I think that's a somewhat specious argument, there really was no continued criminal conduct.

The second point the Government raised, reflecting on the commentaries, was that he had not made restitution for the crime. Now Mr. Stinson, when he was arrested, signed consents to search and turned over what money he had, which was about $7,400. Approximately $9,400 had been stolen in the bank robbery, the other $2,000 had been spent in the four days that he was off.

He is fully indigent. This man has been in prison since he was, I believe, seventeen years old, other than this escape, and there simply is no way, of course, for him to make restitution.

The third point is admission to authorities, I've already covered that. No one, of course, has asked him to make any statements other than the Probation Officer and he did respond fully and frankly to the Probation Officer.

The fourth point the Government raised was that he did not surrender himself. Well, that's true in a technical [22] sense, but I don't know if the Court is aware, this was – Mr. Stinson was considered armed and dangerous by law enforcement and so great care was given to his capture in Gulfport, Mississippi, once he was located there. I believe the streets were closed off around the motel, or the street in front of the motel, part of the motel was evacuated. Mr. Stinson was aware of this.

The shotgun that was involved in the robbery was in the van and that's where it was found when the van was searched. Shells – the shotgun was not loaded, I don't believe – shells were in the van, it could be loaded. He didn't arm himself and resist this arrest which was obvious, but he walked our and peacefully surrendered.

And as I said before, he cooperated with the authorities from the moment of being taken into custody, on.

And the fifth point, just acceptance of responsibility. He's never denied responsibility for this offense to anyone who has ever asked him about it.

Judge, we would take the position that he has affirmatively, as much as he could have, accepted responsibility for this offense. We believe the Probation Officer was correct in the original Presentence Report in according Mr. Stinson acceptance of responsibility for the offense.

THE COURT: Anything further, Mr. Henry?

[23] MR. HENRY: Yes, Your, if I could respond.

Mr. Kent says that the Government's response in this letter was with known facts known to the Probation Officer. I assert that you know – I can't argue for Mr. Carter – I think Mr. Carter may have overlooked certain facts when he acknowledged acceptance of responsibility, and that's why I pointed out that out of the seven examples that are given by the Sentencing Guidelines Commission we can refute six of them and the seventh doesn't apply.

The first one is voluntary termination from criminal conduct or associations. Mr. Kent, I believe, diverts the Court's attention from that particular example by saying that he didn't continue in criminal conduct or associations. I believe that that statement is incorrect, but it's very true that he did not voluntarily disassociate himself from criminal conduct and terminate or withdraw from his criminal conduct.

He may be indigent, but another one of the examples is voluntary payment of restitution. Nothing has been given back to the victims of the offenses other than what was seized after his arrest.

Voluntary and truthful admission to authorities of involvement in the offense and related conduct. The police officers found themselves in a position of doing what

is right and not talking to a defendant who has asserted his [24] Constitutional right to have an attorney, and then have it used against them at sentencing by saying that he's never been given an opportunity to talk to police officers.

I think what is most telling is the example, voluntary surrender to authorities promptly after commission of the offense. This was four days later. He was trying to flee the motel when officers and agents made his arrest. He had called a cab and he was getting into the cab when the cab was surrounded. And then, of course, the cab driver was an F.B.I. agent who assumed the role of the cab driver.

Voluntary assistance to authorities in recovering the fruits and instrumentalities of the offense. If he's unable to do it, he shouldn't be given credit for acceptance of responsibility.

And the last one, the timeliness of his conduct in manifesting the acceptance of responsibility. Our position all along has been that Mr. Stinson's defense of justification is made up, it's a con. We believe that when the Court knows all of the facts surrounding it, things that we'll bring to the Court's attention, that the Court will agree with us that he has not accepted responsibility for what he has done, he has merely turned it into justification, which is not correct, is not legally correct, and shouldn't be used in his favor.

MR. KENT: Nothing further.

[25] THE COURT: The Court, having heard argument, finds its factual determination, and the Court today, even at this point the defendant has stood before the Court and has admitted to the Court not only the offense but also the first bombing McDonald's, the second at Regency Lake Apartments, and the Court would

find that the defendant has affirmatively accepted responsibility for his conduct pursuant to the criteria set forth in the sentencing guidelines; therefore, Paragraph 38 would be negative 2.

The Court is going to now go through, before going to the next objection, Mr. Kent. to see where we are concerning the numbers, and would ask the Probation Officer to follow along to make sure that there's no question concerning the arithmetic.

Paragraph 23 would be increased by 2 –

Are you with me, Mr. Carter?

PROBATION OFFICER: Yes, ma'am.

THE COURT: – which would make the adjusted offense level 21.

Then the adjusted offense level subtotal under Group 2 would remain the same.

PROBATION OFFICER: Your Honor, is the Court going to increase the offense level in Count Two also?

THE COURT: Correct. Thank you.

That ultimately won't make any difference, will it?

[26] PROBATION OFFICER: No, Your Honor.

THE COURT: Because that would be 13, which would be brought back down, under Paragraph 13 then would be 21, Paragraph 32 would be 13; but the total, the greater adjusted offense level would be 21.

Then Paragraph 35 as it stands would be 1, and the total would be 22, combined adjusted offense level.

Is that accurate, Mr. Carter?

PROBATION OFFICER: That's correct.

THE COURT: Then to the next page, Paragraph 38 would be minus 2, which would bring the total offense level to 20.

Is the math accurate?

MR. KENT: Yes, ma'am, I believe so.

MR. HENRY: Yes, Your Honor.

THE COURT: Then let's go to Objection No. 2, which is page 9, Paragraph 49.

Defense counsel objects to page 9, Paragraph 49, career offender position, wherein the Probation Officer sets forth Count Two, Possession of a Firearm by a Convicted Felon, as the predicate for the career offender determination.

Defense counsel argues that possession of a firearm by a convicted felon is not a crime of violence and should not be used as a predicate offense in determining career offender.

[27] Defense counsel further argues that even if it were a crime of violence, that is possession of a firearm by a convicted felon, Mr. Stinson does not qualify for the enhanced punishment provided for by 18 U.S.C. §924(e), which requires a predicate of three previous convictions for a violent felony or serious drug offense.

In addition, defense counsel contends that the penalty provisions for 18 U.S.C. §922(g), provides under 18 U.S.C. §924(e), that the offender shall be imprisoned for not less than fifteen years. Defense counsel states that nowhere in the statute is there authorization for a penalty of life imprisonment.

The Probation Officer cites 4B1.1 of the guidelines, which states that the defendant is a career offender if

(1) The defendant was at least eighteen years old at the time of the instant offense;

(2) The instant offense of conviction is a felony, that is either a crime of violence or a controlled substance offense; and

(3) The defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

In reference to Subsection (2) above, the Probation Officer utilized Count Two, Possession of a Firearm by a Convicted Felon, as a predicate offense. It is felt that [28] this offense is a crime of violence. Further, the defendant had previously been convicted of crimes of violence on three occasions; therefore, the career offender provision applied.

Count Two carries a maximum penalty of life imprisonment, thus a base level of 37 is appropriate.

Does counsel for the defense have any further argument?

MR. KENT: Yes, ma'am, just to elaborate briefly, I won't belabor this.

These provisions are so technical and so, I think or I find them, complex, that they're hard to follow. But our position is – and we have three essential arguments – the first argument is the predicate offense that the Probation Office is using, possession of a firearm by a convicted felon, that that is not a proper predicate offense under the statute, under the career offender provision of the guidelines.

Our second position is even if it is a proper predicate offense, that – then step two, that as a convicted felon in possession of a firearm Mr. Stinson doesn't qualify for the enhanced life penalty under §924(e), because that enhanced life penalty requires, within §924, three prior violent felonies.

And then our third argument is, well, even if he does have three prior violent felonies for purposes of §924(e), the statute in fact does not provide for a life penalty, but [29] only provides for a fifteen year penalty.

So those are our three positions.

To the first point: Is possession of a firearm by a convicted felon a proper predicate offense for the career

offender provision? Our position is that it is not, and that is because to be a predicate offense under the career offender provisions requires that the offense be a crime of violence. The career offender provision in the guidelines provides the Court with a definition of crime of violence.

Now, we have to know which definition do we use, because the guideline career offender provisions have been amended. They were amended effective November 1, 1989, and a new definition for crime of violence was provided. Our position is that the definition in the previous version of the guidelines is the definition that applies to this offense because this offense, as charged, occurred on October 31 of 1989.

So, we would turn to the definition in the guidelines effective October 31, 1989, to decide what is a crime of violence and that definition says that,

"A crime of violence for purposes of career offender is. . ." –

Bear with me, I have to look at my notes, even I get lost with this and it's my own argument.

". . . as used, is defined in 18 U.S.C. §16."

[30] Now, 18 U.S.C. §16, as the Court is well aware, defines a crime of violence as,

"An offense that has as an element . . ." – and we would emphasize that – ". . . as an element, the use, attempted use, or threatened use of physical force, or

"(2) Any other offense that is a felony in that by its nature . . ." – and we would emphasize that by its nature – ". . . involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Now clearly, possession of a firearm by a convicted felon does not have as an element – it doesn't fit into

the first category – does not have as an element the use or attempted use or threatened use of physical force. So, if it is a crime of violence it has to come in the second category of 18 U.S.C. §16, which is an offense that by its nature involves a substantial risk of force.

Now, the Eleventh Circuit has looked at this definitional problem in *United States v. Cruz*, 805 F.2d 1464, and I have a copy for the Court.

Now here, the question in *Cruz* was not this exact question, in *Cruz* the question was conspiracy to commit a drug trafficking offense, was that a crime of violence. That was the narrow question in *Cruz*. But in *Cruz* there's quite a bit of discussion, the ultimate issue was how do you [31] define this language, "by its nature" and the Government's position in the *Cruz* case was, by its nature you take a case by case approach and you look at the facts and circumstances of the offense, the defendant's particular underlying offense and see was the nature of that crime one which involved force or threatened use of force.

The Eleventh Circuit rejected that approach, and I would submit to the Court that that is the only approach by which the charge of possession of a firearm by a convicted felon could ever be deemed to be a crime involving force or use of force, because only if you looked at the circumstances of the particular offense such as this one where the gun was brandished in an armed bank robbery, were that the circumstances were force was used or threatened, but is the crime by its nature one.

So the Eleventh Circuit rejected that approach and said no, we can't take a case by case looking at the circumstances approach. The bottom line the Court took was that this definition is so ambiguous that we can't understand what it means, and that therefore, this often

invoked but rarely applied rule of lenity has to be applied when we're constructing 18 U.S.C. §16. In applying the rule of lenity in *Cruz* they decided that a drug trafficking conspiracy was not a crime of violence no matter what the circumstances were.

[32]Our position would be similarly here, that of course the statute hasn't been amended, hasn't been clarified, the Eleventh Circuit hasn't changed its position, this definition still applies for pre-November, 1989, offenses, therefore the rule of lenity must be applied and possession of a firearm by a convicted felon is not by its nature a crime of violence.

That's our first position, Judge.

Then our second position is, even if it were a crime of violence, what is the maximum penalty for the predicate offense, because it's that maximum penalty for the predicate offense which establishes the corresponding career offender offense level.

Here the Probation Officer takes the position that the maximum penalty for the possession of a firearm by a convicted felon under 18 U.S.C. §924(e) is life in prison, and therefore the career offender base offense level is level 37.

We dispute that, and our position – well, we dispute that he qualifies for that maximum penalty if that is the maximum. Under §924(e), to qualify for the enhanced penalty the offender has to have three prior violent felonies. Now this term violent felony is a term of art which exists only in §924(e), and is defined in 18 U.S.C. §924. The definition is, or the essential term of the definition which [33]applies here is,

"A violent felony requires use of a firearm."

So, we have to go back and look at Mr. Stinson's prior record, as unfortunate as it is, and determine are

there three violent felonies, three felonies that involve use of a firearm, and we submit that there are not.

First, there was an unarmed burglary, and I think that's clearly not a violent felony for §924 purposes.

Second, there was an aggravated assuault with a firearm. We concede that is a violent felony.

Third, there was an armed robbery. That again, is a violent felony, so that's two predicate violent felonies.

And last, there was a simple assault. Now the simple assault, the facts and circumstances, our position again would be analogous to 18 U.S.C. §16, you should not look at the facts and circumstances, but if you do look at the facts and circumstances, the simple assault in fact did not involve a firearm.

So our position is there were not three prior violent felonies, therefore he does not qualify for the enhancement. If you don't qualify for the enhancement under §924(e), the maximum penalty for the possession of a firearm is ten years; and then we would have to have the corresponding maximum statutory offense level as a career offender for a ten year offense which, I believe, is level 25. I assume [34]the Government's position then would be to use the armed bank robbery as the predicate offense instead.

Then our third position is, well, even if there are three prior violent felonies the maximum statutory penalty under the enhancement of 18 U.S.C. §924(e) is not life, but is only fifteen years.

This is a matter of statutory construction. The statute is, as I think everyone agrees, poorly drafted. It's been amended so many times, and it's never been fully harmonized. §924(a) says that the maximum penalty for a §924 offense is ten years. Then §924(e) says if you have three prior violent felonies you shall be sentenced to

not less than fifteen years. Now, that's the extent of the statutory direction as to penalty. There is no authorization of a life penalty. §924(a) says the maximum penalty is ten years; §924(e) says not less than fifteen.

Now, there has been a decision from another circuit that has held that "not less than fifteen," implies, "or not more than life." and therefore the maximum penalty is life. There is no Eleventh Circuit decision that I'm aware of, though, interpreting this, and it's our position again that this is ambiguous; that actually the statute itself is in conflict, the rule of lenity should apply and the maximum sentence should be no more than fifteen years. And then again, we would apply the corresponding offense level and [35] the career offender position and it would be whatever it is, I believe a level 34.

That is our argument, Judge.

THE COURT: Mr. Henry.

MR. HENRY: Your Honor, I'll try to address Mr. Kent's arguments in the order that he presented them. If I do jump around, I apologize.

Mr. Kent argues that the possession of a firearm by a convicted felon is not a violent offense. We would argue that the *Cruz* case is not applicable to this particular situation because it deals with a subject matter, a drug conspiracy, which is something totally different. We would argue that possession of a firearm by a convicted felon is by its very nature a violent offense.

Now, the only other case that I'm aware of from a Circuit Court of Appeal is *United States v. Williams,* 892 F.2d, 296, at page 304, a Third Circuit, 1989, case. That Court said that how the weapon was used should determine whether or not it's a violent felony in terms of possession of a firearm by a convicted felon.

I argue that this circuit should hold that possession of a firearm by a convicted felon is a violent felony

because the proscription against felons having firearms is because by their very nature the potential for violence exists.

[36] There is some precedent in this circuit as well for that argument. This finding was made in *United States v. Terry Lawan Wright,* which was Case No. 89-228-Cr-J-14.

Mr. Kent's second argument is that even if it is a violent felony, the defendant doesn't qualify because it requires three prior violent felonies. Mr. Kent, I believe, is laboring under the misimpression that the statute has changed the definition of violent felony, but I would ask the Court if the Court would look at 18 U.S.C. §16, that he first cited, and then 18 U.S.C. §924(e)(2)(b). The term violent felony, in the context in which it's written in both cases is the same.

Mr. Kent argued that the term violent felony means that a firearm has to be used in order for a violent felony to exist. That's simply incorrect. §924(e)(2)(b) says that,

"A violent felony means any crime punishable by imprisonment for a term exceeding one year, or . . ." – this is in the conjunctive – ". . . any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult..." – that's in the conjunctive, disjunctive, rather – "...that has as an element the use, attempted use or threatened use of physical force against the person of another."

And then it gives a couple of other types of crime that [37] would qualify.

"Violent felony is an adult act that has the element, the use, the attempted use, the threatened use of physical force, or it can be a juvenile delinquency offense which the Court can consider in determining whether he has a

prior violent felony, but only if there is the threatened use of a firearm, knife or destructive device." That's in the disjunctive.

So the Court can look to when did this crime occur in Mr. Stinson's life and say that it involves the use, attempted use or threatened use of physical force against the person of another.

Mr. Stinson concedes the two prior violent felonies, the armed robbery and the aggravated battery; what he does not concede is a violent felony is the assault on the law enforcement officer. An assault by its very nature, whether a simple assault or aggravated assault, involves the attempted – the use or attempted use or threatened use of physical force against another individual, in this case a correctional officer at the prison.

In fact, in looking at the facts behind this particular case we find that Mr. Stinson used a homemade zip gun in this assault on this law enforcement, this correctional officer. Now, Mr. Kent also argues that the zip gun that was used at the prison was not a firearm. By definition, 18 [38] U.S.C. §921(a)(3), in defining firearms it says,

"The term firearm means any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive."

By its nature a zip gun is designed to expel a bullet. In other words, it shoots a bullet. That's all it is. And whether or not it was capable of firing is not really at issue, but the fact that it was designed and could be converted to that use. So there was a firearm used in that particular case. So even if you accept Mr. Kent's definition, there were firearms used in all three cases; but I believe that the statute does not require that the definition be used.

The last argument Mr. Kent makes is that even if there are three prior violent felonies, the statute does not require a life sentence and that it's not a life felony. I agree with Mr. Kent that there are no Eleventh Circuit decisions to the contrary, but there are at least two other circuits that have found that the maximum term of imprisonment is life.

The first, *United States v. Jackson*, 835 F.2d, 1195, it's a 1987 Seventh Circuit case. Also, *United States v. Gourley*, G-o-u-r-l-e-y, 835 F.2d, 249, it's a Tenth Circuit 1987 case, in which cert. was denied at 486 U.S. 1110. Both [39] of those cases have found that not less than fifteen years implies, and correctly implies, that the maximum sentence that can be imposed is life imprisonment.

Therefore, we argue and we maintain our position that Mr. Stinson has been convicted of three prior violent felonies, and that the maximum term of imprisonment that should be considered in terms of determining the proper sentencing guidelines is life in prison for the possession of a firearm by a convicted felon.

MR. KENT: Judge, there was one thing that I neglected to mention, Mr. Henry did touch on there, though.

Another objection I did have was the career offender provision requires prior crimes of violence as predicates. The Probation Officer has listed three prior crimes of violence. We concede that two of those three, that is the aggravated assault with a firearm in Mississippi, and the armed robbery in Illinois are crimes of violence. But we would, as Mr. Henry points out, dispute the simple assault being a crime of violence, and we just wanted to put that objection on the record.

As to that definition in §924, we believe the burden is on the Government, no matter what definition the Court

follows, whether it follows the disjunctive argument that a firearm is not required in a §924(e) predicate offense or not, still the burden is on the Government to prove the [40] violent felony. We don't think that the Court can simply infer out of thin air that a simple assault under Mississippi law, by its nature or as an element, requires the use of force or threatened force against an individual.

MR. HENRY: Your Honor, I apologize for not having the same legal education as Mr. Kent, but I cannot imagine where I missed the point that an assault was not by its nature a violent act. Even a simple assault involves some sort of violence. He pled to simple assault to a law enforcement officer, which is a felony and a violent felony.

We stand by our position, and I can't imagine that there is any authority in any location, anywhere, that would hold that an assault is not by nature a violent act or a potentially violent act.

THE COURT: First of all, as to Defendant's Objection No. 2, page 9, Paragraph 49, the Court would overrule that objection.

The Court would find, first of all, that the offense of possession of a firearm by a convicted felon is a crime of violence, both by its nature and how the weapon was used in this case. The Court would further find that the maximum penalty for this offense is a term of up to life in prison.

In addition, the Court would find that the simple assault referred to as the third predicate offense in argument by counsel and also by the Probation Officer, is a [41] violent act, and would overrule the objection.

The third objection which is to page 9, Paragraph 49, defense counsel objects to the use of simple assault as a

predicate act. Is this the same argument that you just made?

MR. KENT: Yes, ma'am.

THE COURT: The Court then would overrule Objection 3, page 9, Paragraph 49, in light of its previous findings, and permit both counsel for the defendant and Government to adopt their argument made.

Also as to Objection 3, the Court would note the argument as presented in Objection No. 3, and the position of the parties and would find that the position has been accepted as accurate.

Going on, then, to Objection 4, page 13, Paragraph 75. Defense counsel objects to the Probation Officer's inclusion in factors that may warrant departure, Section 5K2.4 of the guidelines.

As far as this objection, would defense counsel have objection to the Court taking up any questions of departure in the area of mitigation or aggravation, or would defense counsel wish the Court to rule on it as far as the report is concerned?

MR. KENT: I don't know that it matters, Judge, however the Court wants to proceed.

[42] THE COURT: The Court would find at this time that the total offense level is 37, the criminal history category is 6, which is 360 months to life imprisonment, three to five years supervised release, $20,000 to $2,000,000 fine, and a $250 special assessment.

Counsel maintains their previous argument, but is that an accurate calculation in accordance with the Court's findings?

MR. KENT: Yes, ma'am, it is.

MR. HENRY: Yes, Your Honor.

THE COURT: The Defendant, Terry Lynn Stinson, having entered pleas of guilty to Counts One, Two,

Three, Four and Five to the indictment charging bank robbery, possession of a firearm by a convicted felon, using a firearm during a crime of violence, possession of an unregistered firearm and interstate transportation of a stolen motor vehicle, the Court would adjudicate him to be guilty of said offense.

Is there any legal cause to preclude the pronouncement of sentence?

MR. KENT: No, ma'am, there is not.

THE COURT: At this time –

MR. HENRY: Your Honor, could I interject something just briefly?

If Your Honor has determined that he is entitled to two [43] points for acceptance of responsibility, I think that that would have to come off of the career offender as well, under the *Miller* decision, *United States v. Miller* – or *State of Florida v. Miller*. Even though the sentencing guidelines under which the crime was committed do not call for a two point reduction for acceptance of responsibility the latest amendments, the November, 1989, do entitle him to that.

THE COURT: That's the reason that the Court, in making the findings, went through the Presentence Investigation Report previously. Going through the report –

MR. KENT: Judge, I believe that Mr. Henry's comment has already been reflected in the calculation because we took the –

THE COURT: I think so, but that's why I went painstakingly –

MR. KENT: I think so.

MR. HENRY: That's where I –

THE COURT: – through it.

MR. HENRY: – that's why I'm confused, Your Honor, becuase he would get two additional points for

obstruction of justice under the career offender provisions. There is no –

THE COURT: The only way the Court can deal with [44] sentencing guidelines and the computation is to take it page by page, line by line, calculation by calculation. That's the reason each finding the Court made, the Court adjusted the numbers, asked the Probation Officer and counsel for the defense and Government if that was accurate in accordance with the Court's findings, reserving to counsel any arguments previously made.

I'm going to go back through – counsel may be correct but I can't deal with it in that way, Mr. Henry.

MR. KENT: Judge, let me retract, I believe Mr. Henry is correct, and as we go through it I think we'll see.

THE COURT: It may adjust and change.

If the Probation Officer would take it page by page, starting with page 4.

PROBATION OFFICER: Your Honor, in Paragraph 17, reflecting a total offense level of 18, Paragraph 19 we're adding 1, which results in a total of 19.

Paragraph 23, we added 2 for the obstruction of justice, which results in an adjusted offense level, Paragraph 24, of a total of 21.

Paragraph 25 reflects 4 levels; 26, five.

Paragraph 28, 2 additional levels.

Paragraph 29, the Court indicated a 2 level increase for obstruction of justice.

Paragraph 30 –

[45] THE COURT: That would be, 27 would be 2 – 27 would be 2, so 30 would be 13.

PROBATION OFFICER: 27 –

THE COURT: No, excuse me.

PROBATION OFFICER: Paragraph –

THE COURT: No, never mind. Go on. Mr. Kent, are we together so far?

MR. KENT: Yes, ma'am.

THE COURT: Mr. Henry, are we together so far?

MR. HENRY: Yes, Your Honor.

THE COURT: Go ahead.

PROBATION OFFICER: Paragraph 31 should reflect an adjusted offense level of 21.

Paragraph 32 should reflect a total offense level of 13.

Paragraph 33, total number of units assigned, 1½.

Paragraph 34, the greater of the adjusted offense level above should reflect 21.

35, increase an offense level 1.

36, combined adjusted offense level 21 – that should be 22, Your Honor. Paragraph 36 should be 22.

THE COURT: Is that correct, Mr. Kent?

MR. KENT: Yes, ma'am, I believe so.

THE COURT: Mr. Henry?

MR. HENRY: Yes, Your Honor.

[46] THE COURT: Mr. Carter.

PROBATION OFFICER: And on page 26 – I mean page 6, Paragraph 38, an adjustment for acceptance of responsibility should reflect a two level decrease, which results in a total offense level of 20.

MR. KENT: Judge, where the problem arises is –

THE COURT: Proceed through the rest of it.

PROBATION OFFICER: That's all I have on calculations, Your Honor.

THE COURT: The rest of the calculations remain the same.

What calculation are you addressing, Mr. Henry?

MR. HENRY: Your Honor, when you get to the career offender provisions – I'm looking for it –

MR. KENT: Page 9, Paragraph 49 and Paragraph 50.

MR. HENRY: Paragraph 49 reflects an offense level of 37. Under the sentencing guidelines promulgated in November 1, 1989, to which I believe Mr. Stinson is entitled to the benefits of those, he can't be harmed by them because of ex post facto, but I believe under *Florida v. Miller* he's entitled to the benefits, he would get a 2 point acceptance of responsibility which would give him a level 35 in a criminal history category 6.

That's important at this stage. It's important for me to know what the calculation is –

[47] THE COURT: Is that correct, Mr. Carter?

PROBATION OFFICER: Yes, Your Honor.

If the Court decides that Mr. Stinson is a career criminal, the Court will assign a new base offense level, and from that the adjustment should be subtracted.

THE COURT: So Mr. Kent, then, when the Court stated that the total offense level is 37 –

MR. KENT: That was not correct, it should be 35.

THE COURT: Is that accurate, Mr. Carter?

PROBATION OFFICER: Yes, Your Honor.

THE COURT: Is that accurate, Mr. Henry, from the Court's finding?

MR. HENRY: Yes, Your Honor.

THE COURT: The Court would find, then, that the total offense level is 35; the criminal history category is 6, which is 292 to 365 months.

The Court having adjudicated the defendant guilty of the offenses, is there any legal cause to preclude pronouncement of sentence?

MR. KENT: No, ma'am, and I appreciate Mr. Henry's noticing that.

THE COURT: Mr. Henry, is there any legal cause?

MR. HENRY: No, Your Honor, although I have an announcement to the Court as to a motion the United States wishes to make.

[48] THE COURT: Certainly.

MR. HENRY: Prior to sentencing, Your Honor, I'm aware that the Court gives the United States the opportunity to give information in aggravation, but I do want to state the United States at this time moves the Court to depart from the sentencing guidelines upwards to the level of 37, and the criminal history category of 6, which would give a sentencing range of 360 months to life in prison, and I intend to back up our request to the Court by additional information and testimony.

THE COURT: Certainly. This is referred to in Objection 4, page 3, Paragraph 75 in the addendum.

MR. HENRY: Yes.

THE COURT: Counsel may proceed. Will this be very lengthy, Mr. Henry?

MR. HENRY: I don't know how to judge it, Your Honor. I expect it could be.

THE COURT: If counsel and defendant wish to be seated at this time you may do so.

Mr. Randolph, he should hear me.

MR. HENRY: Your Honor, I would call Special Agent Sobolewski.

THE COURT: Certainly.

Would you raise your right hand, please.

(The witness is sworn by the Court.)

[49] THE COURT: Would you go ahead and take the stand –

THE WITNESS: Thank you, Your Honor.

THE COURT: – I think you'll be more comfortable.

MR. HENRY: May it please the Court.

THOMAS J. SOBOLEWSKI,

called as a witness by the Government, being first produced and duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HENRY:

Q. You're Thomas J. Sobolewski with the F.B.I.?

A. Yes, sir.

Q. And you have been so employed for twenty-four years?

A. Nineteen and a half.

Q. Nineteen and a half, I apologize.

You were the case agent investigating the bank robbery which has led us into court today, is that correct?

A. Yes, sir.

Q. During the course of your investigation as the case agent, was it your responsibility to receive and to house certain evidence seized from Mr. Stinson in Mississippi?

A. Yes, sir.

Q. Did you personally do an inventory of the items that were seized from Mr. Stinson in Mississippi?

A. Yes, sir.

[50] Q. If you could, without rushing too much so that the import of those items is not lost on the Court, but without spending too much time could you detail to the Judge some of the things, or all of the things that were seized from Mr. Stinson that have, by its nature, a potential for violence of something of that nature?

A. Yes. There were numerous items which had been recovered from the property of Mr. Stinson when he was arrested in the state of Mississippi on November 3rd, 1989, and included in those particular items, along with numerous items which were personal, included a quantity of hazardous materials which included the compon-

ents for additional bombs that could have been manufactured by Mr. Stinson or whoever had possession of those particular components.

Those components included items such as inert hand grenades.

Q. How many of those?

A. There were a total of three inert hand grenades.

There were fourteen shotgun shells. There were model rocket engines with igniters. There were boxes of, black plastic boxes with switches. There were two remote switches for garage door openers.

There was a sixteen ounce can of black rifle powder, a four ounce can of PVC cement, five books of matches, a 75 foot roll of speaker wire, a 15 foot section of blue two-[51]strand wire, two battery terminal connectors, an earphone jack, three size AA batteries, a roll of masking tape, a roll of waterproof tape.

A plastic bag, sixteen rubber bands, one rubber bottle nipple, two cross-tip screwdrivers, one black plastic O-ring, one razor knife and blade, two ¾ inch PVC pipe and caps, and a 1¼ ounce tube of Elmer's Glue.

All of these items which had been recovered, in my estimation, and in speaking with some individuals, including Gunner Hains from the United States Navy, could be utilized for the manufacture of explosive devices.

Q. There were other things found in Mr. Stinson's belongings, is that correct?

A. Yes. There were other items which included approximately – I don't remember the exact number, but it was a quantity of ammunition which was actually inert rounds of ammunition which could be utilized in the, in a model MAC-10 9mm. semiautomatic handgun.

Q. Was that found?

A. Yes, this was – these were items which were also found in the possession of Mr. Stinson when he was arrested in Gulfport, Mississippi.

Another item that was found was a Model M-16 automatic rifle, which is similar to a military rifle, which would be used by the military in this country.

[52]Q. Now you say model, was this a small model or a full size model?

A. No, it's a full size model which is, which looks exactly like an M-16 weapon. It's a replica of an M-16 weapon.

Q. What about the MAC-11, did it look exactly like a real MAC-11 pistol, automatic pistol?

A. It most certainly does. I think if anyone were ever confronted with either of these two weapons, or the Model 45 semiautomatic weapon which was also recovered, I think if anyone were ever confronted with those particular weapons that they would probably be interpreted as being real. I know if I were confronted with a weapon like that I would most certainly anticipate it being a real weapon.

Q. What else?

A. There was a New England Arms Company sawed-off 12 gauge single barrel shotgun, serial number NA-127586, which was an operational weapon, which was traced through investigation as being purchased by Mr. Stinson at the K-Mart store on Atlantic Boulevard, Jacksonville, Florida.

There were numerous items, other items, which included knives and components for clips – excuse me, components for military type equipment which included belts, some handcuffs – thumb handcuffs, excuse me.

Q. What about the knife? Describe the knife to the Judge.

[53] A. There was a huge Buckmaster knife, which is a military type knife, something that would be, I guess, easily described as a Rambo type huge knife.

Q. Did you also find a – did somebody do an inventory and provide you with a report?

A. Yes, sir.

Q. And who did the original inventory?

A. The original inventory was done by a Detective by the name of Landy Phillips from the Harris County Sheriff's office in Gulfport, Mississippi.

Q. And his report, Exhibit 16, lists numerous – or Exhibit 13, numerous items. Could you list some of the rest of the things that were found?

A. Yes. A black gas mask and filter, a black nylon SWAT type duty belt containing a Realistic brand ten channel programmable scanner and carrying case.

And, by the way, in association with that programmable scanner I found a list of the Jacksonville Sheriff's office call numbers. I also turned the programmable scanner on while in the office of the F.B.I. here in Jacksonville, and could intercept the various channels of all communications from the Jacksonville Sheriff's office.

Other items that were included were two clip pouches containing two .45 caliber clips each, one black nylon pouch, one black plastic canteen and carrying case, one [54] Buckmaster brand buck knife and carrying case containing two handcuff keys.

One Paralyzer brand stun gun, which was a functioning stun gun. One black nylon shotgun shell belt, one black nylon duty belt containing five nylon pouches, one of which contained two pairs of thumbcuffs, one black nylon shoulder holster, one black nylon pouch.

One black cloth tote bag with shoulder strap, one black beanie cap which was kind of a watch cap, is what

it is. One black military beret, one Delta patch, one brown leather belt, one Minolta Freedom 100 35 mm. camera with blue carrying case.

One yellow nylon rope, one black nylon braided cord, a can of Krylon – K-r-y-l-o-n – flat black enamel spray paint, one can of Aerboe – A-e-r-b-o-e – rustproof paint, three spools of multipurpose thread, two 12 inch hacksaw blades, two 10 inch hacksaw blades, one blue flat file, one blue round file.

One capital MX-2 35 mm. camera in a black case. The Radio Shack Police Call Radio Guidebook, which I previously mentioned. One KMC Profit 200 Solar Dual Power Calculator, one Texas Instrument Calculator.

A manilla envelope containing assorted papers, a radio antenna, a gold butterfly knife.

Q. Can you tell us what that is? It suggests something [55] small and pretty.

A. A gold butterfly knife?

Q. Yes, sir.

A. It's just a folded hand knife.

Q. When it's unfolded what size would it be?

A. Well, it's approximately, the blade I think was three or four inches in length.

Q. Okay.

A. One belt buckle bearing the words, "State of Texas."

A pack of 20 sewing needles, an empty brown bag, a man's combat coat, a black pair of combat trousers, two white towels, and a replica screw-on aluminum silencer which could have – which can be fixed to the replica 9 mm. Uzi type weapon, which was also located.

Q. Did you see that also?

A. I certainly did. I tried the, I affixed the replica silencer to the replica Uzi type machine gun.

Q. We've called it a MAC-11 earlier, is that the same weapon that you're talking about? The Uzi and the MAC-11, is that the same thing?

A. Yes, sir. Excuse me if I addressed it as a MAC-11 previously, I was incorrect; it's an Uzi, U-z-i type weapon.

Q. Okay, thank you.

MR. HENRY: No further questions, Your Honor.

MR. KENT: Just a couple of questions, Judge.

[56] CROSS EXAMINATION,

BY MR. KENT:

Q. Mr. Sobolewski, there was just one real gun in all of this stuff, though, wasn't there?

A. Yes, sir, that was the sawed off shot gun.

Q. And that was purchased at the K-Mart over on Beach Boulevard in Mr. Stinson's – he used his own name, didn't he, his true name?

A. Yes, he did. As a matter of fact, the other half of that shotgun, the remaining part of the barrel had been recovered in the shotgun – excuse me, in the pickup truck that had been used by Mr. Stinson in his escape from the robbery.

Q. And these other weapons are model guns, toy guns. Although they look very real, look just like the real thing –

A. Yes.

Q. – can be mistaken for the real thing, they are just toy guns?

A. They are replicas, yes, sir.

Q. And if you – you couldn't, in fact, injure anyone with those models or toy guns unless you banged them over the head with them, could you?

A. That's correct.

Q. And so if somebody meant to injure or hurt someone, [57] they wouldn't have that kind of weapon, would they? Or they couldn't use that kind of weapon to injure or hurt?

A. They could use it to injure or hurt someone if they struck them but not to shoot them, if that's what you're trying to determine.

Q. Yes.

A. Yes, sir.

Q. And the last question. No one in this whole ugly, terrible crime spree, no one was physically injured, was there?

A. Not that I'm aware of.

Q. Thank you, sir.

MR. HENRY: No questions.

THE COURT: Thank you.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MR. HENRY: Your Honor, what is the Court's pleasure for argument at this time?

THE COURT: Is there any further testimony?

MR. HENRY: No, no more testimony, Your Honor. I'm prepared to argue.

THE COURT: Mr. Kent, if you and your client would come forward, then.

We're arguing both mitigation and aggravation, so it would be Defendant's Objection No. 4, page 13, Paragraph 75. [58] The Government's motion for upward departure pursuant to 5K, §2, and Defendant's motion, any motion concerning mitigation.

Mr. Henry.

MR. HENRY: Your Honor, §5K2 gives a number of alternatives, but not all inclusive alternatives; but one of the ones it does use is the abduction.

I studied the guideline manuals before coming into court today because we've been with them approximately two years now and sometimes we overlook the simplest precepts of what the guidelines are designed for. Whether or not you approve of them or disapprove of them, they're still the law and we have to abide by that.

There are some interesting things in the guidelines. They quote a statutory mission. In the statutory mission the basic purpose of criminal punishment they give four. I would assume by the fact that they list them, that they list the most important in their minds first and the least important last. Those four are to deter crime, to incapacitate the offender, to provide just punishment, and then last, to rehabilitate the offender.

It also notes that in dealing with the guidelines how difficult it is to reach everyone's philosophical considerations in the guidelines or in imposing the sentence.

[59]One of the philosophical considerations that the guidelines recognizes is one they call just deserts, in other words, will the defendant get what he justly deserves for doing the crime, noting that the offender's culpability and the resulting harms are two things that that philosophy looks at.

The second philosophy is one of crime control. The first consideration is will it lessen the likelihood of future crime, and second, will it deter others.

It is my position that whatever philosophical consideration this Court believes internally, that in either case, whether it's just deserts or whether it's crime control, this Court should sentence Mr. Stinson to life in prison.

This case involves a number of different things that even the career offender provision overlooks. The career offender kicks into place when certain things happen.

The three – the two prior felonies, and a certain type of offense; the two prior violent felonies kicks it in, too. And what it doesn't look at is what happens surrounding the crime itself, because once it gets to the career offender then those things surrounding the crime no longer play in the making of the point system. That's the one thing that I was most concerned about.

A person who – possession of a firearm by a convicted [60]felon with two prior felonies who is just walking down the street, is automatically entitled to – depending on Mr. Kent's standpoint – a 25, and we say it's a potentially violent felony and that it's automatically a 37.

But it forgets about some of the other things that go along with the crime. That's a crime where it's a status offense, a person is walking with a firearm.

In this case we have an abduction to carry out the crime itself. The car dealer was abducted, placed in a closet, told that there was an explosive device in the apartment and that if he moved within forty-five minutes he'd blow up with it. He was put into the closet, bound at gunpoint with the shotgun, in order to steal the conversion van which was used to get away from the Jacksonville area. In fact, the evidence showed that Mr. Stinson went to Disney World because a Disney World parking pass was found in the van stamped with the same date in that afternoon.

Another consideration in this case is that he brandished a dangerous weapon both in the bank and to the car dealer. In the bank he brandished both the shotgun and the grenade.

The sentencing guideline notes on page 1.14 that you consider it a dangerous weapon if the object appeared to be a dangerous weapon. In this case it was an inert grenade, in other words, there was no powder in it; but to all

[61] intents and purposes to the people that were in the bank, and even to the police officers and the ordnance disposal people who came to the bank later on, it appeared to be a live grenade.

There was a firearm used in the case, the shotgun.

This involved more than minimal planning, because we see from both the testimony of the witnesses that were interviewed after the case, and the testimony of Special Agent Sobolewski, there was a police scanner which was tuned in to the Jacksonville Sheriff's office frequencies. It involved getting a getaway vehicle, it involved placing himself in a position where he could get to and from the bank in the easiest manner.

We note that in this particular case, since his escape, contrary to what Mr. Kent would have the Court believe that he's had minimal criminal involvement since his escape, since his escape we note that the victims who have been touched by Mr. Stinson include the owner of Cox Pools in Tallahassee, who was taken at gunpoint with one of the model weapons. He was taken at gunpoint, forced to write a check, and was put in thumbcuffs before Mr. Stinson stole his truck and fled the scene.

In the bank we have the three people that were in the main part of the bank that came under Mr. Stinson's gaze, who saw the grenade, saw the scanner and saw the firearm, [62] including Ms. Benson, Ms. Nevins and Ms. McGraw, who have told me that they are concerned, they're concerned with this type of act as any banker and any employee of the bank would be, and they fear for their safety in the bank and think the Court should send a message.

There were other people in the bank who were not in the main area when the bank was being robbed, who have suffered trauma as a result of it, to come out from the

bank and find out that there is a grenade which for all intents and purposes looks like a real grenade, in the lobby, that their bank has been robbed. Some of those employees have left the bank as a result of this particular bank robbery, whose effectiveness as bank employees suffered even before they left the bank.

The Sun Bank itself was the victim of missing $1,996.34.

The car salesman, Mr. Dormany, is a victim. He was abducted, he was terrorized, he was put into a closet.

The company that he works for, Mike Davidson Ford, has been a victim. They suffered a loss of $967.49 as a result of having to recover the car, the conversion van, bring it back, make repairs that needed to be made.

The McDonald's at University and Beach Boulevard was a victim of Mr. Stinson because of placing the bomb in the restroom. They had to vacate the McDonald's. There was [63] some damage to the restroom caused by the ordnance people when they disarmed or rendered the bomb neutral.

And we also have as a victim the United States Navy who had to spend their time and their efforts to dispose of two bombs.

We note that – even though the Court has already considered this in determining Mr. Stinson is a criminal history category 6 we note that he has a burglary in 1977, an aggravated assault in 1978 where a handgun was used, an armed robbery in 1979 where a handgun was used, an attempted escape from the prison in 1981 in Mississippi, and I guess we'd have to ask the prison officials how in their infinite wisdom they would put somebody with Mr. Stinson's background in a minimum security county facility where he was allowed to walk away from the facility in 1989 and escape to Florida.

We also note from the presentence investigation that there were two counts of armed robbery dismissed in a plea bargain.

We also have the assault on the correctional officer in 1982, which was the escape where he used the zip gun, a homemade gun.

Mr. Stinson is facing armed robbery, kidnapping, grand theft auto and use of a firearm in a felony in Tallahassee, and he's also facing armed robbery, kidnapping, auto theft [64] in Jacksonville.

The inventory that I asked Special Agent Sobolewski to read was done for a specific purpose, and that is to advise the Court that Mr. Stipson appears to be a man who is arming himself for war. Whether it's war against society or war against a specific individual, but Mr. Stinson had the beginnings of an entire outfit, military outfit.

He has demonstrated through his conduct in the past, and I believe by the things that we have shown the Court today, that he has the potential for escalating behavior. Mr. Stinson is a human time bomb looking for a place to go off. We've believed that from the beginning, we believe it today. The more information we receive only reinforces our belief that Mr. Stinson has the potential to kill someone, that's why we've asked for that life sentence.

This Court should not buy Mr. Stinson's story that he robbed a bank in order to get thrown into Federal prison to stay away from Mississippi prisons because the execution, in other words the way he carried this out, just does not make any sense. Most of the things that Mr. Stinson did to prepare for this bank robbery and the things that he did subsequent to the bank robbery do not support that justification defense that he's brought to this Court.

First of all, he had the fake hand grenade that he took into the bank. The first thing anybody in the bank saw was [65] the fake hand grenade.

He had a fake .45 caliber pistol with a shoulder holster that would only need to be displayed to the individuals. I expect at some point in time that Mr. Kent will tell you, and I'll tell you in advance, that the .45 had a little red dot on the end of the barrel. If it were pointed at somebody it would be apparent that the gun itself was not real. But in a shoulder holster or tucked into a waistband the gun is absolutely faithful to a .45 caliber Colt pistol, as noted by Special Agent Sobolewski.

He had the fake Uzi with the silencer that for all intents and purposes looked like a real weapon.

Any of those devices could have been used to rob that bank without having to get a sawed-off shotgun. And even assuming that the sawed off shotgun looks more real, which there will be no evidence before this Court that that's true, he also bought fourteen 12 gauge rounds to go along with the shotgun. That weapon was totally unnecessary if all he needs to do is rob a bank. In fact, I submit to the Court, he doesn't need to come all the way to Jacksonville, Florida, to rob a bank, that he could have done that anywhere if his goal is to get into a Federal prison.

He didn't need to steal a van. He didn't need to go to Disney World. He didn't need to spend almost two thousand dollars in cash.

[66] He has a number of excuses for what he does and why he does it, and the Court has been given some of the information from which I get this information. But I submit to the Court that Mr. Stinson's excuse for everything that's happened in his life – and let me say that it is difficult to argue this on the one hand without saying

that I feel sympathy for Mr. Stinson. That may be hard for Mr. Stinson to believe because of the tenor of my argument, but I do. I think it's a tragedy to this society that Mr. Stinson's life has been so wasted. I see no potential for Mr. Stinson to come back into society and to do anything good, but I see some great potential for Mr. Stinson to harm people, and that's the position and the reason for the position we take.

But Mr. Stinson has lived his life by making excuses for why he does what he does. I've been provided, and I believe the Court has been provided, with a letter that Mr. Stinson wrote to Mr. Kent, showing that – or trying to make excuses for what he did. In a nutshell what he says is that he came from a broken home, that peer pressure caused him to do some of the things he did; and then as he became an adult every time he got into a situation he panicked, and that's what caused those things.

I was also provided with his jail jacket from the Mississippi prison and note that in the presentence investigation for the armed robbery where he shot an [67] individual, his excuse for that was the individual, the victim had a pistol in the car and the farther they went the more afraid that Mr. Stinson would get and finally Mr. Stinson claims that he blanked out and doesn't know what happened after that.

And then in the instant offense we see an additional cop-out, and that is that he's afraid of going back to Mississippi prison and therefore he wants to be put into a Federal prison.

What you see, Your Honor, is an individual who has lived his life in nothing but a destructive manner, and who shows every potential for continuing that destruction.

The only sentence that will deter Mr. Stinson and incapacitate Mr. Stinson and provide just punishment

for Mr. Stinson's conduct here, and in relationship to his conduct in the past, is to give Mr. Stinson a life sentence, and we respectfully ask this Court to sentence Mr. Stinson to life in prison.

THE COURT: Mr. Kent.

MR. KENT: Thank you, Your Honor.

Mr. Henry, and the Court.

Judge, I have several exhibits and copies for the Government I forgot to give them earlier.

What these are – much of it is redundant, it appears to be a lot but the first several items are – I provided to [68] Mr. Henry the prison record of Mr. Stinson from Mississippi which I subpoenaed, and which in fact was returned, the subpoena was returned directly to Your Honor.

Out of that prison record, which is quite thick, I pulled what I felt to be the evidence that Mr. Stinson, while he was at Parchman, the Mississippi State Prison at Parchman, Mississippi, that he had in fact cooperated with Federal authorities in giving information about a rather major money order postal scam or forgery ring that was operating out of the prison; and as a result of that cooperation, which also involved evidence against people who worked at the prison, it was determined that his life was in jeopardy. That is the reason, which otherwise might seem somewhat inexplicable, why Mr. Stinson was transferred to this Leflore County jail.

Now, one of the first is this red tag item. Now, this isn't just Mr. Stinson's own statement, but this is in the top of the prison jacket now. When Mr. Stinson was arrested in Gulfport after this crime spree, he was taken back to Parchman and the first thing they put in the top of this file was this red tag report indicating that his status is he needed to be in protective custody.

Then the next item – these are somewhat out of order – is a statement showing that he was released to the county jail by the Superintendent of Corrections. The explanation [69] for that comes later.

The third defendant's exhibit is the escape report, and this is just to back up what I said, that he walked away as a trusty, that is from the Leflore County jail. That was on January 7th, 1989.

The next, Exhibit 4, is a certification from the Circuit Judge, and the full certification is in the prison record which I provided Mr. Henry, after this simple assault and escape attempt from Parchman, which happened back when Mr. Stinson was twenty-one years old, the Circuit Judge there who sentenced him on that simple assault and escape certified that,

"None of said prisoners are especially dangerous, nor will they require more than ordinary care and precaution in handling in my opinion."

And the previous page listed Mr. Stinson; there were three or four prisoners who were being sent back.

Then Exhibit No. 5, just another reference to his statements that he had made.

Exhibit No. 6 is especially interesting, and I believe that from the best I could tell this is a security level designation from Parchman. This designation was made after the arrest in Gulfport, after this – after the totality of his criminal history at Parchman, who has known him for what, eleven years or more, designated him as just [70] moderately dangerous and on the adjustment moderate security is necessary.

Then there's Exhibit No. 7, which is again a review of his protective custody status. It was necessary to maintain it because his life was still in danger.

Exhibit 8 is the same thing, another review, he still needs to be in protective custody.

Exhibit 9 is where he is actually transferred to Rankin County Correctional Facility which is another county jail. That was his first transfer for protective custody.

Then there's a statement from the Superintendent of the prison himself, which this is Exhibit 10, and it's signed by the Superintendent:

"This inmate has cooperated with MDOC officials, narcotics agents and law enforcement officials by giving information regarding money order scams, use of illegal drugs, and implicating inmates involved in these activities.

"The administration feels that protective custody is warranted for the safety and welfare of this inmate."

Exhibit 12 is a letter from Deputy Superintendent – and this is the end of April, 1988 – suggesting that they should take him out of the county jail and put him back in Parchman because it wasn't necessary to keep him in Parchman, and this was the gist of Mr. Stinson's concern and why he escaped from the county jail or walked away, because [71] he had learned or heard or believed that, in fact, every three months they were reviewing his protective custody and reviewing keeping him in the county jail, and he had learned that the next review they intended to take him back to Parchman.

This is indicated here, that review was at least one that the Deputy Superintendent was recommending he come back to Parchman.

Exhibits 13 and 14 are just interviews by Mr. Eddie McFarland, who is the Investigator for the Federal Public Defender in Tallahassee, Florida, who interviewed two of the employers of Mr. Stinson while he was, the year he was out in Tallahassee working, and they both comment favorably on him and I think support the statements I made earlier that there was a rowdy crowd in the construction crew but Mr. Stinson behaved himself and stayed out of the scrapes and was a good worker.

Exhibit 15 is, it's a lengthy letter that was written back at the time Mr. Stinson was in the county jail in protective custody, explaining his fear of being taken back to Parchman, and it explains in some detail the threats and the cooperation he had given.

So, this is not something, in other words, that's being manufactured here today.

We're not asking the Court to agree that this crime in [72]any way was justified in any way by these threats. That's not the position. I am asking the Court to understand that these threats were real, that Mr. Stinson was in part motivated by this. It didn't justify the crime, that's why we didn't go to trial. I persuaded Mr. Stinson this is no justification for crime. It's certainly not legal and not equitable either, but it was in his mind a motivating factor and it's not something that's just being manufactured here today.

This letter shows that back at the time he's in the county jail what was motivating him and his fear that he's going back to Parchman.

Exhibit No. 16 is just a newspaper report from the time of the arrest. It indicates he surrendered peacefully.

Exhibits 17 and 18 are F.B.I. 302 reports from the agents on the scene who, one, indicates to support my statement that he did cooperate, signed the consents that allowed them to, or on which they searched the van and the motel room in which they recovered the fruits and instrumentalities of the crime, the money, what was left, and the gun.

And the last exhibit, the 302 indicates that when advised of his rights he said he wanted a lawyer and so the F.B.I. properly didn't question him any further, and that's why no statement was given.

[73]Those were the exhibits, and I would ask the Court to accept those in evidence.

MR. HENRY: No objection.

THE COURT: Those will be filed in evidence.

(Defendant's Exhibits Nos. 1 through 18 rec'd in evidence.)

THE COURT: The Court has reviewed while sitting here the exhibits. Except for the prison record most of the exhibits had previously been reviewed and read, including the letter written by Mr. Stinson.

MR. KENT: Judge, I'll make my comments very brief now, other than that evidence.

If you look at Mr. Stinson's background, there is a series of crimes there, other crimes, a series of crimes committed back when he was seventeen, eighteen, nineteen years old. Now he's thirty years old today. He was sentenced to twenty years in Mississippi for that aggravated assault, then he was taken up to Illinois and sentenced to ten years on the armed robbery up in Illinois.

Now, he tried to escape when he was twenty-one years old from Parchman, which is a notorious Mississippi prison. That escape, he was sentenced on that for the simple assault.

But after that, from the time he was twenty-one to the time he was thirty, there weren't any serious problems. I'm [74]not going to say he was a model prisoner because he wasn't, but he did cooperate with the law enforcement authorities, and he was at least model enough that the year or so he was at Leflore County jail he was a trusty and allowed free run to come and go as he pleased. So he went almost ten years in custody where he was, he was okay.

Now, he was out of prison or out of jail there for almost a year and he didn't commit any new crimes until

this crime spree here that he's being sentenced on. There weren't any arrests. He held a job, he supported himself; and considering I'd say a kid from the time he was seventeen who'd been in prison, now that he gets out and what does he do, he doesn't go out and start robbing convenience stores or robbing gas stations, or snatching purses, but he puts himself to work in a construction crew – I'd ask the Court to consider that strongly – and he does work for almost a year and his employers testified as to his quality as a worker.

He lived at peace, and this was until the traffic stop. He gave his name, as I explained already. He was laid off from work for lack of work in the construction crew, and he comes back home and his roommate says they're here with a warrant, they came by today with a warrant for your arrest. And he just panicked.

This fear of Parchman is no justification for the [75] crime, but that was what was in his mind – that's what was in his mind.

Now, his thinking, not very good, pretty stupid, but was that he's going to commit a Federal crime, he'll get in Federal custody. If he's lucky he'll get a concurrent sentence and he won't have to go back. He only has ten years left on his Parchman sentence, he'll get about ten years, he was thinking, for a Federal bank robbery, and he'll serve that in Federal custody and he won't have to worry about Parchman again. That was the thinking. It's stupid, it's wrong, but that was what he was thinking.

Now, he admitted the offense. That was a trial strategy. He pled, he pled to also avoid the trauma for the witnesses who were the victims in this case. He put his signature on the crime, that's quite clear, that hasn't come out here today. But everything he did, the gun he

bought it in his name, I did bring that out from Mr. Sobolewski. He went and rented an apartment across the way from the bank that was robbed, in his own name.

When he want to get this conversion van he gave his own name. In fact, I believe he showed his prison I.D. as the identification he gave at the car dealer. When he went riding with this car salesman, when he abducted the car salesman he told the car salesman what he was going to do and he told him who he was, and even showed him his prison [76] I.D.

At the bank he didn't make any attempt to cover his face or conceal who he was. Also at the, where he bought these toy guns and things he used his own I.D., his own name.

He robs the bank, he goes back to the apartment and picks up this conversion van he's stolen, he's stolen having left his identification at the car dealer who he is.

Yes, he had a police scanner and he knew from that scanner that they were tracking him because they had put in the bait money a radio transmitter, and from the police scanner from the very beginning he knew he was being tracked and he didn't do anything to dispose of the bait money or the radio transmitter.

Now, there were no injuries to anybody. A horrible crime, but still it could have been really bad. It could have been a case where departure had been warranted. He could have gone in there and fired the shotgun. I mean, he didn't even give a warning blast of the shotgun, he didn't shoot at anybody. He could have armed himself when the F.B.I. and all the law enforcement people surrounded the motel. It could've been a ugly, ugly scene, as they thought it was going to be and they were prepared for that. But he didn't commit any act of violence that injured anybody physically.

[77]Judge, I'd ask the Court to consider sentencing Mr. Stinson to the low end of the guidelines. Now, the low end of the guidelines here, this is no break, it's twenty-four, as I calculate it now under the present guideline the Court has determined would be twenty-four years and four months, plus the consecutive minimum mandatory five years. In other words, the minimum sentence, the minimum sentence today is twenty-nine years and four months. Mr. Stinson is thirty years old, he'll be sixty years old. And that – and I ask the Court to give Mr. Stinson a sentence concurrent with the sentences he's already under. His earliest release under his Mississippi sentence is the year, I think, 2001, and then he has to go to Illinois for another ten years.

If this Court does not impose a concurrent sentence, even if you give him a low guideline, low end of the guideline, it will be a life sentence because he has another twenty years to serve on the state charges that he already has convictions on. So a concurrent sentence, low end of the guidelines, his earliest release from Federal prison would be when he's sixty or right at his sixtieth birthday.

Even if Mr. Stinson is as dangerous as Mr. Henry believes he is, I don't think that there's any way to suggest that he will be that dangerous individual when he's sixty years old, thirty years from now. I think thirty years is plenty of time for this offense.

[78]THE COURT: Mr. Stinson, would you like to make any further statement?

MR. STINSON: I know I've made a lot of mistakes, you know, frankly, you know, I'd like to say, you know, that I realize what I did was wrong, you know, and it affected a lot of people's lives, which I can't change now. But, you know, I wish there was some way I could, but you know, it's – you know, it's tied up the court system

and everything over something that I shouldn't have did in the first place, but I can't change what I've done did, you know. So, I guess I got to, you know, accept whatever is given to me.

Besides that I ain't really got much more to say.

THE COURT: Mr. Henry.

MR. HENRY: Your Honor, just very briefly.

The one thing that Mr. Kent did give to the Court, Exhibit No. 11, is a notice that the same people who are assessing whether he needs custody or not are saying that he no longer needs protective custody. He wants you to believe that the prison officials, when they say he's in some danger, although I suggest to the Court that if the Court reads through the information very carefully you'll see that they're making that assessment based upon what Mr. Stinson is telling them, but he doesn't want you to believe those same people when they say he doesn't need protective custody. For Mr. Stinson, when things don't go right he [79]panics and people have a great potential of getting hurt.

The most telling thing is that if Mr. Stinson is so frightened of prison in Mississippi why did he go back to Mississippi after committing this crime, if his sole reason was to be put into a Federal facility. That along with the other things Mr. Stinson has done makes no sense in the justification argument, and therefore we maintain our position that only life in prison is going to protect society from Mr. Stinson.

MR. KENT: Judge, I included that in an attempt, I guess, to be fair and frank in the disclosure, but after that there were reviews every three months of his custody status, and that letter of input to the classification committee was April 28th of 1988, I believe it is, and he continued in protective custody, and in fact continued at a

county jail as a trusty for four – I mean eight months after that. So there clearly were several classification committee reviews after that letter and the opinion of that writer was rejected.

But there were voices which were counseling bring Mr. Stinson back to Parchman, and he did believe he was going back to Parchman. His parole date was only about eight or nine months after, after his – from the date of his escape in January. He had a parole date from the prison record of around September or October of the year he escaped, which of [80] course would have meant he would have then gone to Illinois if he had been paroled.

But he did have a genuine concern about his safety at Parchman.

THE COURT: The Court would find no legal cause to preclude the pronouncement of sentence.

First of all, the Court would find that it has before it a guideline range of 292 to 365 months.

Counsel for the defendant's motion is for the Court to sentence in the low end of the guideline range, and also to make that sentence concurrent with the other sentence he's presently serving.

The Government's motion is that with the defendant's history and conduct, a sentence for life would be the only sentence that would make society safe.

The only concern that the Court has right now is that the sentencing under Federal guideline sentencing and sentencing under state sentencing are so different that the public has the right to be very, very confused by sentences. The public is used to hearing a life sentence and reading that someone gets out, or is used to hearing a thirty year sentence and people getting out in five years. That does not happen under the structure of sentencing guidelines. There is no parole.

The Court would find that the defendant's conduct, the [81] abduction and unlawful restraint, the disruption of the governmental function of the United States Navy and other law enforcement officials would make the upper end of the guideline range warranted, and without exceeding the guideline range the Court would find that those very factors the Government is concerned about and which concerns the Court greatly, can be accomplished.

Therefore, it is the judgment of this Court and the sentence of the law that the defendant be committed to the custody of the Bureau of Prisons as to Counts One, Two, Four and Five, to be imprisoned for a term of 365 months; as to Count Three, he is to be committed to the custody of the Bureau of Prisons to be imprisoned for a term of five years, that term to be consecutive to Counts One, Two, Four and Five; and the Court would decline to make any recommendation regarding concurrent sentencing.

The defendant would be placed on five years supervised release, and based on the financial status of the defendant the Court would waive imposition of fine. The special assessment would be due forthwith.

Again, the Court having stated its reasons for sentencing in the upward range, would find that if the range did not contemplate a high enough sentence to protect society the Court would have gone outside the range, and has stated that now two times in the sentencing.

[82] The Court having pronounced sentence, does counsel for the defendant or the Government have any objection to the sentence or the manner in which the Court pronounced sentence, other than those previously stated on the record?

MR. KENT: No, ma'am.

MR. HENRY: No, Your Honor.

THE COURT: The defendant would have ten days from this date to appeal. Failure to appeal within the ten day period would be a waiver of the right to appeal.

The Government may file an appeal from this sentence.

You're advised that you're entitled to the assistance of counsel in taking an appeal, and if you're unable to afford a lawyer one will be appointed to represent you.

If there's nothing further we'll be in recess at this time.

(Recess 12:00 o'clock, Noon.)

-o0o-

[Reporter's Certificate Omitted In Printing]

APPENDIX E

UNITED STATES DISTRICT COURT
Middle District of Florida

[Filed 7-6-90]

UNITED STATES OF AMERICA

V.

TERRY LYNN STINSON

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number 90-6-Cr-J-14

William M. Kent
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s): One, Two, Three, Four and Five of the Indictment

☐ was found guilty on count(s)_____
_____ after plead of not guilty.

DATE OF OFFENSES: OCTOBER 31, 1989.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18,U.S.C.,2113(a)&(d)	Bank robbery.	One
18,U.S.C.,922(g),924(a)(2), 924(e)	Possession of a firearm by a convicted felon.	Two
18,U.S.C.,924(c)	Using a firearm during a crime of violence.	Three
26,U.S.C.,5861(d),5871	Possession of unregistered firearm.	Four
18,U.S.C.,2313	Interstate transportation of motor vehicle	Five

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $250.00 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
353-62-6176

July 6, 1990
Date of Imposition of Sentence

Defendant's mailing address:
c/o U.S.Marshal

/s/ Susan H. Black
Signature of Judicial Officer

Defendant's residence address:
c/o U.S. Marshal

SUSAN H. BLACK,
Chief Judge
Name & Title of Judicial Officer

July 6, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 365 months as to each of Counts One, Two, Four and Five of the Indictment, each count to run concurrently with each other.

IT IS FURTHER ADJUDGED that as to Count Three of the Indictment, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE (5) YEARS, to run consecutively to the sentence imposed in Counts One, Two, Four and Five.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

a.m.

☐ at _____ p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for services of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____

with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant is prohibited from possessing firearms or other dangerous weapons.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

(1) The defendant shall not commit another Federal, State or local crime;

(2) the defendant shall not leave the judicial district without permission of the court or probation officer;

(3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report with the first five days of each month;

(4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(5) the defendant shall support his or her dependents and meet other family responsibilities;

(6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for school, training, or other acceptable reasons;

(7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

(8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

(9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(14) as directed by a probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FOR THE MIDDLE DISTRICT OF FLORIDA
STATEMENT OF REASONS

TERRY LYNN STINSON

DOCKET NO. 90-6-Cr-J-14

The Court adopts the factual statements in the presentence report as to which there is no objection, and, as to the controverted factual statements, the Court adopts the position of the probation office as stated in the addendum.

The Court finds no reason to depart from the sentence called for by the guidelines, inasmuch as the facts as found are of the kind contemplated by the Sentencing Commission.

The guideline range exceeds 24 months and the reasons for imposing the selected sentence are as follows: the sentence is being made for the upper range of the guidelines due to the continuing and persistent danger that the defendant continues to present to the public and a history of assaultive and violent behavior, as evidenced by the offender's past criminal record.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3711.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRY LYNN STINSON,
Defendant-Appellant.

October 4, 1991.

Defendant pled guilty to five counts including bank robbery and possession of firearm by convicted felon and was sentenced under career offender provisions of guidelines by the United States District Court for the Middle District of Florida, No. 90-6 Cr-J-14, Susan H. Black, Chief Judge. Defendant appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) possession of firearm by felon was "crime of violence," and (2) application of amended Sentencing Guidelines did not violate constitutional protection against ex post facto laws.

Affirmed.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

In this case, we decide whether a conviction for possession of a firearm by a felon qualifies as a "crime of violence" for purposes of enhancing a defendant's sentence under the "career offender" provisions of the Sentencing Guidelines. We conclude that illegal weapons possession by a convicted felon is inherently a "crime of violence" as defined by the Guidelines, and we affirm the sentence imposed by the district court.

I.

On October 31, 1989, defendant Terry Lynn Stinson robbed a bank in Florida. A few days later, defendant was arrested. At the time of his arrest, defendant was in possession of three inert hand grenades, ammunition, a number of components for the construction of bombs, a razor knife, and a sawed-off shotgun.

Defendant pled guilty to a five-count indictment charging him with bank robbery, in violation of 18 U.S.C. §2113(a), (d), possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§922(g) & 924(a)(2)(e),[1] use of a firearm during, and in relation

[1] Section 922(g) states in pertinent part:

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . .

[footnote continued]

to, a crime of violence, in violation of 18 U.S.C. §924(c), weapons registration violation, in violation of 26 U.S.C. §§5861(d) & 5871, and transportation of stolen property through interstate commerce, in violation of 18 U.S.C. §2312. Defendant had been earlier convicted of three violent felonies. In July 1990, defendant was sentenced under the career offender guidelines to 365 months imprisonment, consecutive to the mandatory minimum five-year imprisonment for use of a firearm during commission of a crime of violence.

II.

A. Career Offender Guidelines

1.

This case is controlled by the career offender provisions, sections 4B1.1 and 4B1.2, of the Guidelines.[2] Under section 4B1.1, a defendant is a career offender if:

(1) the defendant was at least eighteen years old at the time of the offense,

(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §922(g).

[2] Section 4B1.2 and its application notes were amended effective November 1, 1989. Because defendant was sentenced after that date, the amended guidelines and application notes apply. *See* 18 U.S.C. §3553(a)(5) (sentencing courts are to apply the guidelines and policy statements "that are in effect on the date the defendant is sentenced"). We address further the applicability of the amended guidelines *infra* at sections II(A)(2) & (C).

> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. §4B1.1. Defendant argues that the district court's use of his possession of a firearm by a convicted felon conviction as the predicate "crime of violence" offense for career offender purposes under U.S.S.G. §4B1.1, was improper. Defendant argues that possession of a firearm by a convicted felon is not a "crime of violence."

Section 4B1.2 defines the term "crime of violence," borrowing language from 18 U.S.C. §924(e) of the Armed Career Criminal Act:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of injury to another.*

U.S.S.G. §4B1.2 (1989) (emphasis added).

In the application notes to section 4B1.2, the Sentencing Commission has listed a number of crimes fitting this definition and has noted that other offenses are included where

> (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (B) *the conduct set forth in the count of which the defendant was convicted* involved use of explosives

> or, *by its nature, presented a serious potential risk of physical injury to another.*

U.S.S.G. §4B1.2, comment. (n.2) (emphasis added).

The defendant's weapons possession conviction is not among those specifically listed in section 4B1.2 or its application notes, and does not have as a statutory element "the use, attempted use, or threatened use of physical force" as provided in section 4B1.2(1)(i) and application note 2(A). We therefore consider whether the weapons possession conviction satisfies the requirements of section 4B1.2(1)(II) and application note 2(B).

2.

Defendant argues that we cannot look beyond the generic definition of the offense to determine whether weapons possession by a felon is a "crime of violence" under section 4B1.2(1)(ii) and application note 2(B). In support, defendant cites *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990), in which we held that the term "crime of violence," as used in an *earlier* version of the career offender guidelines, "contemplate[d] a generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs."

Such a categorical analysis certainly is allowed under the amended guidelines and application notes. Section 4B1.2(1)(ii), as amended, provides that an offense constitutes a "crime of violence" where it "involves conduct that presents a serious potential risk of physical injury to another." Application note 2, as amended, clarifies that an offense qualifies if "*by its nature*" that offense involves "a serious potential risk of physical injury to

another." Under the amended guideline and application note, then, a sentencing court need not consider the facts underlying a particular offense, assuming such an inquiry is permissible, if the offense "by its nature" presents a serious risk of violence – the offense is a "crime of violence" whether or not the violence actually materialized in the specific conduct with which defendant is charged. Because we conclude that a categorical analysis is at least *permissible* under the amended guidelines, and because (as discussed *infra*) we think illegal firearm possession by a convicted felon "by its nature" imposes "a serious potential risk of physical injury," we need not decide today whether *Gonzalez-Lopez* should be applied to the guidelines and application notes as amended to *require* only a categorical analysis.[3]

---

[3] We note, however, that the holding in *Gonzalez-Lopez* is distinguishable on a number of grounds:

First, the amended version of §4B1.2 applicable here takes its definition of the term "crime of violence" from a different source – 18 U.S.C. §924(e) – than the earlier version.

Second, the holding in *Gonzalez-Lopez* was influenced by the practical difficulties and potential unfairness to the defendant of allowing the sentencing court to determine, in an ad-hoc mini-trial, the actual facts underlying *prior* convictions. *See Gonzalez-Lopez*, 911 F.2d at 547-48. Here, because the offense at issue is the offense of conviction, not a prior conviction, the district court would look only to conduct relevant to the instant proceedings, much like the sentencing court normally does in the course of sentencing a defendant pursuant to the Guidelines. *See* U.S.S.G. §1B1.3(a)(1) (sentencing court may consider all conduct that occurred during the commission of the offense of conviction for which the defendant would be otherwise accountable).

Finally, the amended application note accompanying §4B1.2 contains language that seems expressly to authorize sentencing courts to find crimes of violence even where the offense does not "by its nature" impose a serious risk of physical injury. *See* U.S.S.G. §4B1.2, comment. (n.2) (courts may look to "conduct set forth in the count of which the defendant was convicted" in

[footnote continued]

B. Possession of a Firearm by a Felon as a "Crime of Violence"

We must next consider, then, whether possession of a firearm by a convicted felon constitutes a "crime of violence" because the offense "by its nature present[s] a serious potential risk of physical injury to another." We believe it does.

The Ninth Circuit has already concluded that, under the earlier version of section 4B1.2 and its application notes, "the offense of being a felon in possession of a firearm by its nature poses a substantial risk that physical force will be used against person or property." *United States v. O'Neal*, 910 F.2d 663, 667 (9th Cir. 1990). In support the *O'Neal* court looked to the legislative history underlying 18 U.S.C. §922(g),[4] including a statement by the original sponsor of that legislation to the effect

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deciding whether offense "presented a serious potential risk of physical injury to another") U.S.S.G. §4B1.2, comment. (n.2).

For these same reasons, the courts that have interpreted §4B1.2 and its application notes – as amended – have allowed sentencing courts in some circumstances to look beyond the generic, categorical definition of an offense to the particular facts "set forth in the count of which the defendant was convicted." *See United States v. John*, 936 F.2d 764 (3d Cir. 1991); *United States v. Cornelius*, 931 F.2d 490, 492-93 (8th Cir. 1991); *United States v. Walker*, 930 F.2d 789, 793-94 (10th Cir. 1991); *United States v. Tidswell*, 767 F.Supp. 11 (E.D. Me. 1991); *United States v. Coble*, 756 F.Supp. 470, 474 (E.D. Wash. 1991); *United States v. Hernandez*, 753 F.Supp. 1191, 1196 (S.D.N.Y. 1990).

[4] In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court similarly relied on legislative history to clarify what burglary-related offenses Congress intended to be included as "crimes of violence" when it specifically listed "burglary" as a violent crime for purposes of enhancing sentences pursuant to 18 U.S.C. §924(e). *See id.* at ___ , 110 S.Ct. at 2149-54.

that felons "may not be trusted to possess a firearm without becoming a threat to society." *Id.* (quoting 114 Cong. Rec. 14,773 (1968) (statement of Sen. Long)).

In a similar way, another court decided that, in the context of a pretrial detention hearing, illegal firearm possession by a felon always amounts to a "crime of violence," as defined by the Bail Reform Act.[5] *United States v. Jones,* 651 F.Supp. 1309 (E.D.Mich. 1987). The court in *Jones* offered four independent justifications for its conclusion that the offense of weapons possession by a felon "by its nature" involves a "substantial risk of physical force": (1) felons are more likely to use firearms in an irresponsible manner; (2) felons are acutely aware that such activity is illegal, making the act of weapons possession a knowing disregard for legal obligations imposed upon them; (3) felons are more likely to commit crimes, enhancing the likehlihood the weapon will be used in a violent manner; and (4) illegal weapons possession is an ongoing offense that often is not ended voluntarily, but only through law enforcement intervention, thus "[t]he character of the crime cannot be measured solely as of the moment of discovery and arrest." *Jones,* 651 F.Supp. at 1310. *See also United States v. Phillips,* 732 F.Supp. 255, 262-63 (D.Mass. 1990); *United States v. Johnson,* 704 F.Supp. 1398 (E.D.Mich. 1988).

We find further support for the conclusion that the offense of weapons possession by a felon "by its nature"

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[5]The Bail Reform Act defines "crime of violence" in part as follows:

> . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the couse of committing the offense.

18 U.S.C. §3156(a)(4).

imposes a "serious potential risk of injury" in the legislative history behind 18 U.S.C. §924(e), which streamlined the categories of persons unqualified to receive or possess firearms and established a stiff mandatory minimum punishment.[6] Section 924(e) was included as part of the Federal Firearms Owners Protection Act of 1986, which relaxed federal rules regarding private sales of firearms among sportsmen and collectors while simultaneously "enhanc[ing] the ability of law enforcement to fight *violent crime* and narcotics trafficking." H.R.Rep. No. 495, 99th Cong., 2d Sess. 1 (1986), U.S.Code Cong. & Admin. News 1986, 1327 (report from House Committee on the Judiciary) (emphasis added). Introducing the measure on the floor of the Senate, its sponsor Senator McClure outlined what he considered unduly aggressive federal enforcement of private weapons sales among collectors and sportsmen, and concluded, "We need to redirect law enforcement efforts away from what amounts to paperwork errors and *toward willful firearms law violations that will lead to violent crime; for example,* selling stolen guns, or *selling firearms to prohibited persons.*" 131 Cong.Rec. S9102 (daily ed. July 9, 1985) (statement of Sen. McClure) (emphasis added); *see also id.* at 9113 (statement of Sen. Laxalt) ("[This act] seeks to direct law enforcement efforts toward those firearms transactions most likely to contribute to *violent crime.*") (emphasis added); 131 Cong.Rec. S8700 (daily ed. June 24, 1985) (statement of Sen. Matsunaga) ("Handguns insofar as I am concerned, . . . are intended for use for one purpose only; that is to kill other human beings.

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[6]Defendant's indictment count for weapons possession alleged violations of both 18 U.S.C. §922(g) and 18 U.S.C. §924(e).

Whatever controls we can impose upon the sale and distribution of those weapons of death, I say let us go to it. I am relieved by the language of S.49 to the extent that it prohibits firearm and ammunition possession, receipt, or transportation in commerce by convicted felons....").

Like the legislative body that criminalized weapons possession by convicted felons, we conclude that defendant's offense of conviction "by its nature" imposed a "serious risk of physical injury," whether or not injury results at the exact moment of arrest or anytime during defendant's ongoing possession of the firearm.[7] Because this offense always constitutes a "crime of violence," a convicted felon found guilty of firearms possession is automatically subject to sentence enhancement under the career offender provisions of the Sentencing Guidelines. A sentencing court need not look to the "conduct set forth in the count from which the defendant was convicted," if such an inquiry is permissible,[8] to determine whether a "crime of violence" has been committed.

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[7] In reaching this result, we are unconstrained by dicta in the recent panel opinion in *United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991) (non-argument calendar). In *Briggman*, a panel of this court upheld an upward departure from the Guidelines in a case involving a conviction for weapons possession by a felon. By way of explaining the district court's decision to apply the Armed Career Criminal Act instead of the career offender guidelines for purposes of sentence enhancement, the panel said, "[T]he career offender provisions do not apply in this case because [the defendant's] crime was not one of violence." *Id.* at 710. The words of an opinion are not, in themselves, the holding of the case; the decision and the facts define a case's precedential authority. In *Briggman*, the defendant was sentenced pursuant to the Armed Career Criminal Act, not the career offender provisions of the Sentencing Guidelines. Because the excerpted statement – when read in context – was unnecessary to the outcome and was merely an explanation for an action by the district court that was unchallenged on appeal, we are not bound by the language cited from *Briggman*.

[8] *See supra* section II(A)(2).

C. Ex Post Facto Application

Defendant contends that application of section 4B1.2, as amended *after* his offense but *before* sentencing, violates the constitutional protection against ex post facto laws. As noted *supra*, we are bound as a general matter by the specific instruction from Congress to consider the Sentencing Commission's guidelines and policy statements "that are in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(5); *see also United States v. Russell*, 917 F.2d 512, 514 n.2 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1427, 113 L.Ed.2d 479 (1991); *United States v. Marin*, 916 F.2d 1536, 1538 & n.2 (11th Cir. 1990) (per curiam); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546 n.3 (11th Cir. 1990).[9] This circuit has made an exception, however, where the effect of applying an amended guideline "would be to subject a defendant to an increased sentence." thereby implicating the Constitution's prohibition on laws having ex post facto consequences. *United*

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[9] The panel opinion in *United States v. Simmons*, 924 F.2d 187 (11th Cir. 1991), is not to the contrary. In that case, the panel acknowledged the passage of a new guideline that would have covered the offense charged, but the panel did not apply the guideline, ostensibly because "only those guidelines in effect at the time appellant committed the offense are applicable in sentencing appellant." *Id.* at 189 n. 1 (citing *United States v. Bradley*, 905 F.2d 359, 360 (11th Cir. 1990)). The offense in *Simmons* was committed in November 1988, and according to the briefs in that case, the defendant was sentenced in September 1989. But, the new guideline at issue did not take effect until November 1990, more than a year *after sentencing*. As a result, *Simmons* is consistent with the general rule that sentencing courts are to apply the guidelines and policy statements in effect at the time of *sentencing*. The case relied upon by the *Simmons* panel supports this conclusion. In *United States v. Bradley*, the panel held that amendments to the guidelines taking effect *after sentencing* were inapplicable. *See Bradley*, 905 F.2d at 360.

States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990) (citing *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)).

Defendant argues that under the *Gonzalez-Lopez* precedent, discussed *supra*, we would have been limited to a "categorical analysis of the offense of conviction to determine whether it constitutes a "crime of violence" for career offender purposes. *See Gonzalez-Lopez*, 911 F.2d at 547 (offense is considered "crime of violence" if it "typically present[s] the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs"). But, our conclusion that illegal firearm possession by a felon " 'by its nature' impose[s] a 'serious risk of physical injury,' whether or not that risk materialized at the exact moment of arrest, or anytime during defendant's ongoing possession of the firearm" also satisfies the *Gonzalez-Lopez* standard. Defendant's sentence was not enhanced as a result of our application of the newer guidelines and application notes; the Ex Post Facto Clause is not implicated.

III.

Because defendant's instant conviction for weapons possession by a felon is a "crime of violence," as defined in section 4B1.2 and its application notes, the district court properly enhanced defendant's sentence under the career offender provisions of the Sentencing Guidelines. We AFFIRM.

APPENDIX G

UNITED STATES of America
Plaintiff-Appellee.

v.

Terry Lynn STINSON, Defendant-Appellant.

No. 90-3711.

United States Court of Appeals,
Eleventh Circuit.

March 20, 1992.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 90-6-Cr-J-14, Susan H. Black, Chief Judge, of various offenses, including bank robbery and possession of a firearm by a convicted felon, and was sentenced under career offender provisions of the Sentencing Guidelines. Defendant appealed. The Court of Appeals, 943 F.2d 1268, affirmed, and defendant petitioned for rehearing. The Court of Appeals held that Sentencing Commission's amendment to Sentencing Guidelines' commentary, stating that offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, was not binding on Court of Appeals until Congress amended language of Guidelines to exclude specifically possession of firearm by a felon as a "crime of violence."

Rehearing denied.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant-appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING

Before EDMONDSON, Circuit Judge, DYER and JOHNSON, Senior Circuit Judges.

[814] PER CURIAM:

This case is before us on a petition for rehearing. Appellant, Terry Lynn Stinson, argues that the Sentencing Commission's recent amendment to the commentary to U.S.S.G. §4B1.2, which states that the offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, is retroactive and applicable to appellant's sentence.

We earlier determined that the law that was in effect when appellant was sentenced was that possession of a firearm by a convicted felon was categorically a "crime of violence." *United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991). We were not alone in this interpretation of Guidelines §4B1.2. At least four other circuits have held that, for sentencing purposes, firearms possession by a convicted felon either is a crime of violence or, at least, could in some circumstances be considered a crime of violence. *See United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990) (holding that offense of possession of firearm by a felon is "crime of violence" within the meaning of Guidelines §4B1.2); *see also United States v.*

Alvarez, 914 F.2d 915 (7th Cir. 1990) (applying a "facts of the case" analysis for whether or not possession of firearm by felon is crime of violence); *United States v. Goodman*, 914 F.2d 696 (5th Cir. 1990) (same); *United States v. Williams*, 892 F.2d 296 (3d Cir. 1989) (same). Before the Commission amended the commentary, no circuit court had concluded that section 4B1.2's term "crime of violence" excluded the offense of unlawful possession of a firearm by a felon.[1]

The Commission's alteration consisted of the following sentence, which was added to section 4B1.2's commentary: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." United States Sentencing Comm'n, Guidelines Manual, Ch. 4, Pt. B, comment., n. 2 (Nov. 1, 1991). The Substance of the Commission's change in the commentary runs directly counter to the substantial volume of precedent interpreting section 4B1.2.

The Commission's amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary. The text of section 4B1.2 was exactly the same in October 1989, when appellant committed his offense, as it is now. When we are faced with the question of whether we should reverse our decision and also ignore precedent from other circuits because of a change in guideline commentary, it is crucial to examine closely the appropriate weight to be afforded to the commentary.

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[1] Since the amendment, two circuits have relied, in part, on the amendment to the commentary to conclude that a crime of violence does not include "possession of a firearm by a felon." *See United States v. Fitzhugh*, 954 F.2d 253 (5th Cir. Jan. 28, 1992); *United States v. Johnson*, 953 F.2d 110 (4th Cir. 1991).

The Sentencing Reform Act of 1984, which authorized the guideline system, tells the courts to consider pertinent policy statements issued by the Sentencing Commission that are in effect on the date the defendant is sentenced. 18 U.S.C. §3553(a)(5). The Guidelines themselves contain a section which specifically addresses the question of what weight is to be given the commentary; U.S.S.G. §1B1.7 states that "commentary is to be treated as the equivalent of a policy statement." The commentary to section 1B1.7 in turn states that "the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." U.S.S.G. §1B1.7, comment.

In general, courts only turn to legislative history when a statute is ambiguous on its face. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In this case, because section 4B1.2's term "crime of violence" was less than clear, we looked to the commentary to clarify the meaning of "crime of violence." But, when we originally interpreted this section, the commentary was silent about whether possession of a firearm by a felon was to be included as a "crime of violence." This new commentary coming after we had construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary—or newly created "legislative history"—by the Sentencing Commission.

A brief review of the Sentencing Guidelines enactment procedures seems appropriate. After the Sentencing Commission's initial guidelines were submitted to Congress, and after the prescribed period of congressional review, the guidelines took effect on November 1, 1987. The Commission has the authority to submit guideline amend-

ments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. §994(p). Yet, the commentary is never officially passed upon by Congress. According to the enabling statute, Congress is only charged with reviewing the amendments to the guidelines.[2] If there is no change to a particular guideline, but the Commission alters that section's commentary, there is no evidence that Congress reviews it or is even notified of the alteration.[3]

Therefore, we must be mindful of the limited authority of the commentary. We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts. As far as we can tell, at no point has this change been called to Congress's attention, much less, been authorized by Congress. Although commentary should generally be regarded as persuasive, it is not binding. *See United States v. Elmendorf*, 945 F.2d 989 (7th Cir. 1991); *United States v.*

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[2] *See* 28 U.S.C. §994(p). We assume that the commentary does not go through the same intensive review process as the guidelines themselves, for if they did share the same procedure, there would be no basis for a distinction between the guidelines and the commentary; and there would be no reason for them to exist separately or to have the different weight which the guideline commentary, itself, says exists.

[3] In upholding the constitutionality of the guidelines in the face of a constitutional challenge based on excessive delegation of legislative power grounds, the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 666, 102 L.Ed.2d 714 (1989), stated that "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines. . . ." We note, however, that there is no mention that Congress has the power to amend directly the guidelines' commentary which we see as uniquely the Commission's work product.

Pinto, 875 F.2d 143, 144 (7th Cir. 1989). We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a "crime of violence."[4]

Therefore, we stand by our original interpretation of section 4B1.2: that possession of a firearm by a felon inherently constitutes a "crime of violence." Accordingly, appellant's sentence is affirmed and the motion for rehearing is DENIED.

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[4]Of course, it would be equally satisfactory if the Commission changed the text of the guidelines to exclude firearm possession and submitted the altered text for congressional review during the prescribed period. *See* 28 U.S.C. §994(p). This practice would ensure that Congress passes upon the amendment and that there is no improper delegation of legislative power. *See Mistretta*, 488 U.S. at 394-395, 109 S.Ct. at 666.

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

November 9, 1992

William Mallory Kent, Esq.
Assistant Federal Public Defender
311 West Monroe Street
Suite 318
Jacksonville, Florida 32201

Re: 91-8685 – Terry Lynn Stinson v. United States

Dear Mr. Kent:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted, limited to the following question: "Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1, see USSG Section 4B1.2 comment. (n. 2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. Section 3742(f) (1)."

Enclosed are Memoranda describing the time requirements and procedures under the Rules, together with a Specification Chart for your use.

Please note that this case will be argued in the March Session. Requests for extensions of time to file briefs on the merits *are not favored*. The deferred appendix method may not be used.

Since the petitioner is proceeding *in forma pauperis*, we will meet the costs of printing the joint appendix and the printing of petitioner's brief. However, it is your obligation to submit the copy to use in proper form to send to the printers.

After you have reached an agreement with opposing counsel as to the contents of the joint appendix, you should immediately prepare a manuscript copy of the joint appendix and submit it to this office to be printed. Please number the pages of the joint appendix to insure proper order. When submitting xeroxed material, please be sure that it is a clear and legible copy. Printed copies will be forwarded to you and opposing counsel as soon as they are available.

In the meantime, you can be working on your brief. As soon as you receive the printed copies of the joint appendix, you may then insert in your brief the proper printed page references to the joint appendix before forwarding your brief to this office to be printed. The typewritten copy of your brief should reach this office no later than December 23, 1992, for printing. You should also serve a typewritten copy of your manuscript brief on opposing counsel.

The printer will provide you with a galley for proofreading and insertion of page citations. When you receive this galley from the printer you should begin work on it

immediately and return it to the printer as soon as possible. The proofreading is only to correct any printer errors and no substantive changes can be made in your brief. This office will forward you printed copies of your brief and serve copies on opposing counsel.

These are the only expenditures paid by this office, unless appointment of counsel is made by this Court. If you desire to be considered for appointment by this Court, you should forward to this office a typewritten motion for such appointment pursuant to Rule 39. I wish to advise that if you do file the motion, the Court may not necessarily appoint counsel who argued the case below.

If no motion for appointment of counsel is filed within two weeks after the Court accepts a case for review, this office will assume that no such motion will be filed.

If we can be of any assistance to you in this matter, please feel free to call upon us.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Assistant Clerk